AL 14-000-7575

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

April 1, 2014

Janet McCabe
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Ms. McCabe:

On behalf of the Senate Committee on Environment and Public Works, we invite you to testify before the Committee at a hearing entitled, "Hearing on the Nominations of Janet G. McCabe to be the Assistant Administrator for Air and Radiation of the U.S. Environmental Protection Agency (EPA), Ann E. Dunkin to be the Assistant Administrator for Environmental Information of the EPA, and Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board." The hearing will be held on Tuesday, April 8, 2014, beginning at 10:00 AM in Room 406 of the Dirksen Senate Office Building. The purpose of this hearing is to examine the nomination of Janet G. McCabe to be the Assistant Administrator for Air and Radiation of the Environmental Protection Agency, Ann E. Dunkin to be the Assistant Administrator for Environmental Information of the Environmental Protection Agency, and Manuel H. Ehrlich, Jr., to be a Member of the Chemical Safety and Hazard Investigation Board.

In order to maximize the opportunity to discuss this matter with you and the other witnesses, we ask that your oral testimony be limited to five minutes. Your written testimony can be comprehensive and will be included in the printed record of the hearing in its entirety, together with any other materials you would like to submit.

To comply with Committee rules, please provide 100 double-sided copies of your testimony at least 48 hours in advance of the hearing to the Committee at the following address: 410 Dirksen Senate Office Building, Washington, DC 20510-6175. To ensure timely delivery, the copies of testimony must be hand delivered to 410 Dirksen. Please do not send packages through FedEx, U.S. Mail, or overnight delivery services, because they will be subject to offsite security measures which will delay delivery. Please also email a copy of your testimony (in both MS Word and as a PDF file) to the attention of Mara Stark-Alcalá, Mara_Stark-Alcala@epw.senate.gov, at least 48 hours in advance.

If you plan to use or refer to any charts, graphs, diagrams, photos, maps, or other exhibits in your testimony, please deliver or send one identical copy of such material(s), as well as 100 reduced (8.5" x 11") copies to the Committee, to the attention of Mara Stark-Alcalá, Mara_Stark-Alcala@epw.senate.gov, to the above address at least 48 hours in advance of the hearing. Exhibits or other materials that are not provided to the Committee by this time cannot be used for the purpose of presenting testimony.

If you have any questions or comments, please feel free to contact David Napoliello of the Committee's Majority staff at 202-224-8832 or Bryan Zumwalt of the Committee's Minority staff at 202-224-6176.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

AL 13-000-8292

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510–6175

July 25, 2013

Kenneth Kopocis
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Mr. Kopocis:

Thank you for appearing before the Committee on Environment and Public Works on July 23, 2013, at the hearing entitled, "Hearing on the Nominations of Kenneth Kopocis to be Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency (EPA), James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the EPA, and Avi Garbow to be General Counsel for the EPA." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer, Vitter, Inhofe, Barrasso, Sessions, Wicker, Boozman, and Fischer for the hearing record. Please submit your answers to these questions by 10:00 AM, July 29, 2013, to the attention of Mara Stark-Alcalá, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Mara_Stark-Alcala@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact Grant Cope of the Majority Staff at (202) 224-8832, or Bryan Zumwalt of the Minority Staff at (202) 224-6176 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

Environment and Public Works Committee Hearing
July 23, 2013
Follow-Up Questions for Written Submission

Questions for Kopocis

Questions from:

Senator Barbara Boxer

1. The Office of Water is responsible for administering two of the nation's most important infrastructure investment programs – the Clean Water and Safe Drinking Water State Revolving Funds (SRFs). Unfortunately, infrastructure in this country continues to decline. The American Society of Civil Engineers rates our wastewater and drinking water infrastructure a "D".

    a. Do you commit to work with this Committee to ensure that we are adequately investing in the Nation's wastewater and drinking water infrastructure?

    b. Even in the tight budget times that we face, will you work to ensure EPA continues to place a priority on investment in the State Revolving Funds?

2. EPA recently released an integrated planning framework to help cities comply with stormwater and wastewater requirements. The framework ensures cities will reduce harmful pollution and comply with the Clean Water Act but does so in a flexible manner that allows local governments to address the worst problems first and prioritize investments.

    a. Do you believe this is a successful model that EPA can use to work with municipalities to reduce pollution?

    b. If confirmed, will you work with state and local governments to promote the use of this framework around the country?

3. It is critical that EPA use the best available science when implementing federal laws, such as the Safe Drinking Water Act, and carrying out policies to protect water quality in lakes and rivers.

    a. Could you please describe the importance that you place on ensuring the use of the best available science in making decisions under the Clean Water Act and Safe Drinking Water Act?

    b. If you are confirmed, will you ensure that the Agency continues the use of the best available science in making decisions about safe drinking water and clean rivers and lakes?

4. Mr. Kopocis, the majority of your career has been spent here in Congress, including working as a member of the staff of this Committee. You worked on numerous bipartisan initiatives, including the successful passage of the Water Resources Development Act of 2007.

    a. If confirmed, what experiences and lessons from your congressional career will you bring to the Office of Water?

b. What is your perspective on how the Office of Water can work best with this Committee and the Congress?

5. Will you follow the Safe Drinking Water Act in establishing a drinking water standard for perchlorate?

Senator David Vitter

Topic: "Waters of the United States" Guidance Document

1. During this past week's nomination hearing, I thought your answer to my question regarding the statutory authority for the Clean Water Act (CWA) draft Guidance was unclear.

    a. Explain the Environmental Protection Agency's (EPA) statutory authority to conduct "Guidance" on what constitutes "waters of the United States"?

2. It is also my understanding that under the draft Guidance, the Army Corps of Engineers and EPA would assert jurisdiction over tributaries, meaning "a natural, man-altered, or man-made water body" with an ordinary high water mark and including ditches that "drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water."

    a. Does this regulatory assertion apply to virtually any ditch through which water flows?

    b. If not, how does the Guidance's purported tributaries jurisdiction comport with the plurality's opinion in *Rapanos* (which emphasized that jurisdictional waterbodies must be described "in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes'" (*Rapanos*, 547 U.S. at 739)), and with Justice Kennedy's concurrence in *Rapanos* (which recognized that "the breadth of [a] standard . . . regulat[ing] drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it . . . precludes its adoption" (*Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring))?

3. The draft Guidance asserts that the precursor statutes to the CWA "always subjected interstate waters and their tributaries to federal jurisdiction."

    a. Given that for a century prior to the CWA courts "interpreted the phrase 'navigable waters of the United States' in the [CWA's] predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible to being rendered so," (*See* Rapanos v. United States, 547 U.S. 715, 723 (2006) (plurality opinion)) is this assertion in the Guidance accurate?

    b. Isn't it instead true that all interstate waters have never been subject to federal control, and that the exercise of federal jurisdiction over all interstate waters has no legal basis?

4. During your confirmation hearing you were asked about the following statement in an EPA fact sheet titled "Agriculture Exemptions Remain:" "This guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted cropland, or practices for identifying waste treatment systems and prior converted cropland." Referring to this statement in the fact sheet, Senator Fischer asked you about the status of the exemption for prior converted cropland. You testified that there is no attempt in the draft guidance or in any documents currently under consideration to in any way adversely affect the current exemption for prior converted cropland.

    a. Is the same true for exemptions for waste treatment systems?

    b. Is EPA attempting in the draft guidance or in any documents currently under consideration within the Agency (including a proposed rule, draft guidance, permit, or

enforcement action) to in any way adversely affect the current exemption for waste treatment systems?

Topic: EPA's Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Water

5. Mr. Kopocis, your office, the Office of Water, has requested the Office of Research and Development (ORD) to develop a report on the connectivity of streams and wetlands to downstream waters. I am told ORD confirmed that the draft report is COMLETED and awaiting transmittal to the Science Advisory Board (SAB) panel for its review.

    a. Under the Administrator's pledge, made during her confirmation hearings, to increase transparency, will you commit to releasing the report immediately so that the public can begin its review?

    b. What public interest is served by embargoing the report?

    c. I understand it is a large and complex report but what harm would there be in that approach?

    d. Who decides whether the now completed draft should be made available to the public?

Topic: EPA's Conductivity "Benchmark"

6. While the U.S. District Court for the District of Columbia set aside EPA's conductivity "benchmark" that it had applied to Appalachian streams in the case of *NMA v. Jackson*, EPA recently published several papers supporting its conductivity actions, and has stated that it is in the process of developing a conductivity water quality criteria. In the past, EPA has failed to address scientific critiques that have produced evidence that conductivity is not a good indicator of benthic/aquatic health.

    a. Going forward, what plans does EPA have to take this growing number of studies into account?

    b. How does EPA intend to convert a field-based study performed in Appalachian waters into a national standard?

Topic: EPA's Authority Under Section 404(c) of the CWA

7. In March, 2012, the U.S. District Court for the District of Columbia struck down EPA's retroactive revocation of a mining-related CWA Section 404 permit, holding unequivocally that EPA has no authority to retroactively veto CWA Sec. 404 permits issued by the U.S. Army Corps of Engineers. However, EPA appealed that decision and in April of 2013, the U.S. Court of Appeals for the District of Columbia reversed the decision of the District Court.

    a. What do you think the practical effect on industry will be of having Section 404 permits subject to EPA's veto authority even years after permit issuance and even if the permittee is in full compliance with the terms of the permit?

8. During deliberations on the CWA in Congress, Senator Muskie noted that there are three essential elements to the CWA. These are "uniformity, finality, and enforceability." EPA Administrator

Gina McCarthy likewise acknowledged the importance of providing permittees with a sense of finality upon permit issuance.

a. How will you, in your capacity of Assistant Administrator of Water, work to implement the CWA in a manner that provides uniformity and finality throughout EPA's regulatory programs and permitting decisions.

b. How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

c. Have you considered what effects EPA's actions might have on state Surface Mining Control and Reclamation Act (SMCRA) permitting programs?

Topic: EPA's Draft Bristol Bay Watershed Assessment and Pebble Mine

9. The EPA's Bristol Bay Watershed Assessment looks to be a potential precursor to an unprecedented veto of a mining project even before the project proponent has had a chance to submit a permit application. Along with other Committee members, I recently asked the agency to explain what harm would result from the Agency allowing the normal regulatory process to play out, instead of its current approach of speculating on hypothetical mining scenarios. EPA's July 16, 2013, response contended that abandoning the prejudicial assessment and allowing the CWA and National Environmental Policy Act (NEPA) procedures to play out would "increase uncertainty among Bristol Bay stakeholders," even though it is EPA's prejudicial evaluation of the Pebble Mine project that caused the uncertainty in the region.

   a. Why does EPA feel it cannot evaluate a project solely on its merits and only once an actual permit application is submitted?

   b. List and explain all economic impact analyses the Agency has done in the region.

   c. Specifically, can you speak to the unemployment rate and poverty-associated challenges that may or may not be alleviated for people in that part of Alaska with the mine as a potential income source – or is this a factor that EPA's analysis does not address?

10. EPA's July 16, 2013, letter also called for the Pebble Mine proponents to submit their final mine plan.

   a. Does EPA believe that project proponents do not have a right to decide for themselves when it is appropriate to begin the permitting process and when to submit their own permit application?

11. You indicated in your oral testimony that EPA "chose to not favorably respond" to a petition to preemptively veto the potential Pebble Mine project in Alaska. Your answer appears to leave open the possibility that EPA may still favorably respond to the petition at some point and preemptively veto the project before the project proponent submits its permitting applications.

   a. Has EPA decided once and for all that it will not preemptively veto the Pebble Mine project?

12. Also during your oral testimony, and in response to my question regarding how much money EPA has spent to date on the Bristol Bay Watershed Assessment, you indicated that EPA

estimates it has spent through earlier this year approximately $2.4 million in external costs, but you did not know of an estimate of the internal costs to EPA.

a. Is it true that EPA lacks an estimate or accounting for the internal costs spent on the watershed assessment?

b. If not, please provide the estimate.

Topic: Proposed Rule for Cooling Water Intake Structures under Section 316(b) of the CWA and EPA's "Stated Preference Survey"

13. Unlike programs for other media, water impacts are specific to the conditions present in individual waterbodies.

a. Given this premise, will the final Section 316(b) rule provide the necessary flexibility for state regulators to implement it based on local conditions?

b. Also, will the Office of Water under your leadership shift direction and focus on the use of science instead of relying on flawed opinion surveys to develop unsupportable benefits positions when conducting economic analysis?

14. How many human health impacts will be avoided if the proposed Section 316(b) standards are promulgated?

15. Can you please explain how utilizing the stated preference survey complies with the Data Quality Act and comports with the best available science?

16. How does EPA intend to utilize its final stated preference survey report?

17. Will you please provide the charge questions EPA is submitting to the SAB with regard to the stated preference survey for the Section 316(b) rule?

18. Does EPA intend to create name a new subcommittee or use the existing subcommittees?

19. What is the purpose of seeking consultation from the Fish and Wildlife Service on 316(b)?

20. How does EPA intend to use the Biological Evaluation?

Topic: Definition of "Fill Material"

21. The current definition of fill material, finalized in May, 2002, unified the Corps and EPA's prior conflicting definitions so as to be consistent with each other and the structure of the CWA. The current rule solidifies decades of regulatory practice, and includes as fill material those materials that, when placed in waters of the U.S., have the effect of raising the bottom elevation or filling the water. However, while both EPA and the Corps have stated that they are now considering revising the definition of fill material, Acting Assistant Administrator for Water Nancy Stoner stated at a May 22, 2013, Subcommittee on Water Resources and Environment hearing that EPA is not actively involved in discussions with the Corps on revising the rule.

a. Will you commit to maintaining the current regulatory definition of fill material?

b. What is EPA's rationale for potentially revisiting the well-established division of the Section 402 and Section 404 programs?

c. What specific problems is EPA seeking to address by revisiting the definition of fill material, and how exactly is EPA intending to address them?

d. Has EPA yet considered the time and costs associated with making such a change to the two major CWA permitting schemes – Sections 402 and 404?

Topic: National Stormwater Discharge Rule

22. I am happy to hear that EPA has decided to comply with CWA Section 402(p)(6) and will complete a study and submit to Congress a report on the necessity of new stormwater discharge rules under Section 402(p)(5) prior to issuing any new stormwater regulations. Please understand that this requirement is not a paper exercise. Notwithstanding this commitment, I am concerned that EPA fails to understand the purpose of this study and report and EPA's responsibilities and authorities under the CWA.

    a. Do you agree that the potential regulation of additional sources of stormwater (other than sources identified in Section 402(p)(2)) is a complex issue of great interest to states, municipalities, small businesses, and other stakeholders?

    b. Do you agree that the development of the study and report to Congress under section 402(p)(5) should be an open and transparent process with stakeholder input, including the opportunity to comment on both a draft study and a draft report?

    c. Do you agree that the study must be completed before a report is issued?

    d. Do you agree that the development of regulations under Section 402(p)(6) must be based on the results of studies under section 402(p)(5)?

    e. Will you commit to me that you will comply with the CWA and suspend any stormwater rulemaking efforts until a study and report under Section 402(p)(5) are completed? Any rule that is developed without the benefit of the results of the study is ultra vires of EPA's authority under section 402(p)(6).

23. Do you agree that the CWA does not regulate the flow of water?

24. Do you agree that EPA can require permits under Section 402 only for discharges of pollutants from a point source to a water of the United States?

25. Explain the purpose of EPA's new "National Stormwater Calculator," given the fact that this tool estimates the runoff of water, not the discharge of pollutants from a point source.

26. Can you assure the Committee that this Calculator will not be used for any regulatory purpose, given the fact that the CWA does not regulate water?

27. Can you assure this Committee that this Calculator will not be used to usurp the authority retained by States under Section 101(g) and will not in any way be used to affect the quantities of water within waters of a State?

28. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in *VA Dept. of Transportation v. EPA* (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

29. Unless EPA has decided to forego rulemaking under Section 402(p)(6), please explain to me why EPA has expended federal resources on the development of a Calculator, which has no regulatory purpose, while continuing to fail to comply with Section 402(p)(5).

Topic: *Sackett v. EPA*:

30. In *Sackett v. EPA*, the Supreme Court held that the Sackett family in Priest Lake, Idaho could obtain immediate judicial review of a CWA compliance order. I recognize that the Sacketts continue to fight the merits of EPA's compliance order in federal district court, but I would like to better understand the circumstances behind EPA's decision to deny the Sacketts their day in court in the first place.

    a. Was it fair for the agency to give the Sacketts the so-called "option" of going through the CWA permitting process or awaiting civil prosecution just so that they could contest EPA's position that their land contained jurisdictional wetlands?

    b. Did the EPA apologize to the Sacketts for denying them their day in court for more than four years?

    c. If the agency has not or you do not know, can you make sure that EPA does indeed do so? An apology would at least demonstrate that the Agency has some understanding of the toll this case has taken on the Sacketts.

31. If a landowner receives or obtains a jurisdictional determination from the EPA which indicates that his or her land is jurisdictional wetlands, may the landowner challenge the determination immediately in court if he or she believes the land is not jurisdictional wetlands?

32. If you are confirmed, will the Office of Water and EPA continue to prioritize the prosecution of small landowners who unwittingly cause little to no impacts to wetlands and other waterbodies, or will the Office of Water and EPA instead focus on actual and significant environmental threats?

Topic: Hydraulic Fracturing

33. In 2010, EPA made an announcement on its webpage, without providing a notice and comment period, that requires underground injection control permits for diesel fuel related hydraulic fracturing. Subsequently, EPA proposed a draft guidance document detailing the regulatory program for hydraulic fracturing operations using diesel fuels. At no point has EPA acknowledged the congressional mandate in the Safe Drinking Water Act (SDWA) which states that EPA may not prescribe requirements which interfere with or impede the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations...unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

    a. Does EPA intend to abide by the limitations imposed on EPA under the SDWA?

b. If yes, what evidence has EPA supplied that new regulations are essential to assure that underground sources of drinking water will not be endangered by such injection?

c. Has EPA undertaken any analysis related to current industry practices and has EPA considered the robust oil and natural gas regulatory programs in place at the state level?

d. What has been your role and the role of the Office of Water with the ongoing EPA study on hydraulic fracturing?

e. When will the study be complete?

f. What is the status of prospective sites being tested for the study?

Topic: National Selenium Water Quality Criterion

34. EPA is currently involved in a scientific assessment of selenium that will be used to propose a new national selenium water quality criterion. EPA has stated that it intends to put out its proposed criteria for public comment this coming fall. In response to her own confirmation questions, EPA Administrator Gina McCarthy committed to ensuring that EPA reviews technical comments it receives on any proposed selenium criteria document and makes appropriate revisions to ensure that any final criterion is of high quality.

    a. Under your leadership, what would the Office of Water's strategy be for incorporating relevant scientific critiques and comments received into its final selenium criteria?

35. Administrator McCarthy further stated that EPA would work with industry to develop a national selenium criterion that satisfies technical standards while retaining appropriate site-specific flexibility.

    a. How will EPA take the site-specific nature of selenium issues into account when developing its national criterion?

Topic: Effluent Limitation Guideline for Coalbed Methane Operations

36. EPA continues to move forward with an effluent limitation guideline (ELG) for coalbed methane operations. Since the time that EPA began this initiative, the dynamics related to coalbed methane production have changed. EPA's ELG plan assumes natural gas prices in the range of approximately $7 mcf to over $9 mcf. Today the price of natural gas remains near $4 mcf. The low price of natural gas makes coalbed methane less economically competitive, resulting in a decrease in coalbed methane production. Additionally, most of the produced water production associated with coalbed methane operations occurs at the beginning of the production process because the coalseam must be dewatered to allow gas to flow to the surface. Therefore, with few new coalbed methane operations being contemplated, most of the coalbed methane produced water has already occurred.

    a. In light of these dynamics, why is EPA's effort to promulgate a coalbed methane effluent limitation guideline a valuable exercise?

Topic: Standards for Perchlorate under the Safe Drinking Water Act (SDWA)

37. As you are no doubt aware, the EPA Office of Water is in the midst of a rulemaking to set standards for perchlorate under the SDWA. Members of this Committee have had questions as to whether the risks presented by perchlorate justify the extensive resources that EPA has invested to date in this controversial rulemaking. Most recently, the SAB questioned EPA's entire approach for setting this standard and recommended that the Agency use a different methodology.

    a. If you are confirmed, will you assure us that you will undertake a thorough and independent assessment of this rulemaking and determine whether regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources?

    b. If you determine that regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources will you provide an explanation of other EPA priorities that will need to be delayed or abandoned in order to finalize the perchlorate MCL?

Topic: *Iowa League of Cities v. EPA*

38. In *Iowa League of Cities v. EPA*, the Eighth Circuit determined that two letters from EPA to Senator Grassley regarding wastewater treatment processes were the equivalent of regulations. Both were vacated as procedurally invalid. However, it has come to my attention that EPA believes that *Iowa League of Cities* was wrongly decided and may attempt to limit this decision to the Eighth Circuit. EPA must recognize the need for transparency and predictability in the regulatory system and go through the proper administrative channels to clarify or develop new rules with respect to wastewater treatment and other activities.

    a. Accordingly, will you commit to applying the *Iowa League of Cities* decision nationally?

Topic: *NMA v. Jackson*

39. The U.S. District Court for the District of Columbia in the case of *NMA v. Jackson* (now *NMA v. Perciasepe* on appeal) recently struck down several EPA actions – specifically, EPA's Enhanced Coordination Process (ECP) and Multi-Criteria Integrated Resource Assessment (MCIR) for Appalachia surface coal mining, as well as EPA's guidance document, "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the CWA, National Environmental Policy Act, and the Environmental Justice Executive Order" – as violating the CWA and Administrative Procedure Act (APA), as well as, in the case of the guidance document, the Surface Mining Control and Reclamation Act. Administrator McCarthy stated that EPA has directed its field offices not to use the guidance documents impacted by the court decision and instead to rely on regulations promulgated under the APA.

    a. What future actions does EPA intend to take to ensure that the court's decision is fully implemented?

Senator James Inhofe

1. According to the Office of Information and Regulatory Affairs' (ORIA) website controversial EPA draft guidance called "Clean Water Protection Guidance" has been undergoing White House review since February 2012. One of the more controversial concepts contained in the EPA draft is how EPA could assert federal jurisdiction over any isolated wetland "if' the Agency found a "significant nexus" between the isolated wetland and a traditional navigable water (TNW) or interstate waters (IW) based upon a so called biological or ecological connection. This biological or ecological connection between an isolated wetland and a TNW or IW can form the basis of EPA's "significant nexus" test as to why an otherwise isolated wetlands or even categories of land features known as "other waters" (i.e., intermittent stream, wet meadow, playa lake, prairie potholes, etc.), could be found by EPA/Corps to be jurisdictional under the CWA.

   In 2011, the U.S. Fish & Wildlife Service (Service) entered into a voluntary legal settlement with just two environmental groups. Under terms of that legal settlement, the Service is scheduled to make hundreds of species listing determinations and designation of critical habitat under Endangered Species Act (ESA) over the next three years including hundreds of aquatic species (fish, mussels, and amphibians). Private landowners, whose property has been designated as critical habitat for an endangered or threatened species under ESA, face the risk of having their property subject to the ESA's regulatory and permitting requirements. However, under EPA's draft "Clean Water Protection Guidance" these same landowners also face having otherwise non-jurisdictional isolated wetlands becoming jurisdictional wetlands because of this presumed biological or ecological connection.

   a. Under the pending draft Clean Water Act guidance how might the designation of critical habitat by the Service under the ESA; impact how EPA applies the "significant nexus" when evaluating whether an otherwise isolated wetland would become a jurisdictional wetland under the Clean Water Act (CWA)?

2. EPA is developing a national stormwater rulemaking for new and redeveloped sites that will require retention of stormwater, and expand the stormwater programs for MS4's and States. MS4's have programs to manage stormwater from new and redeveloped sites, yet EPA's new regulation will continue to target States and thousands of local governments that do not have the resources to appropriately implement and enforce the existing construction stormwater program, much less a substantially expanded program contemplated by the national stormwater rulemaking.

   a. In developing this new regulation, how does EPA plan to minimize the burden on property owners, developers, state and local government that are already struggling to meet the existing regulatory requirements?

3. EPA is seeking to justify its costly proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be willing to pay to reduce harm to fish at cooling water intakes. This willingness-to-pay approach to determining "benefits" contrasts sharply with the far more traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. The "willingness-to-pay" or "stated preference" survey is clearly intended to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. Using such unreliable benefit estimates will inappropriately lead to extremely expensive cooling water controls that would cause

additional plants to shutter. Recall that in October 2010 NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Toxis Standards. See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010).

a. Given all these problems, would you support withdrawing the survey and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

4. In EPA's proposed 316(b) rule EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For entrainment, EPA appropriately adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each site. Yet for impingement, EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement.

a. In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

Senator John Barrasso

1. Is there anything you disagree with regarding the proposed Clean Water Act jurisdictional guidance?

2. If confirmed, will you continue EPA's practice of using guidance to make major policy decisions regarding the Clean Water Act, or other federal laws under your jurisdiction, as opposed to going to Congress to seek changes?

3. What is your understanding of the role Congress plays versus the EPA in terms of who makes the laws?

4. Do you think Congress originally wanted EPA to regulate ephemeral streams that only have water in them during rain fall events?

5. Do you believe Congress provided limits to federal authority in the Clean Water Act? Please explain in detail what those limits are.

6. The EPA and the Corps affirm that the Clean Water Act Jurisdictional Guidance will result in an increase in jurisdictional determinations which will result in an increased need for permits. How many more EPA personnel and taxpayer funds will be needed to implement this guidance if it goes forward?

7. Do you believe that additional regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production?

8. Do you believe that expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property? If not, why not?

9. Since the Supreme Court's decision in *Sackett v. EPA*, the EPA has recognized that recipients of Clean Water Act compliance orders are entitled to immediate judicial review of the orders. If you are confirmed, will you ensure that EPA also recognizes that recipients of Clean Water Act jurisdictional determinations are also entitled to immediate judicial review?

Senator Jeff Sessions

1. I am informed that EPA is seeking to justify its proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be "willing to pay" to reduce harm to fish at cooling water intakes. It is my understanding that this "willingness-to-pay" approach to determining "benefits" contrasts sharply with EPA's traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. It seems that this "willingness-to-pay" or "stated preference" survey is intended by EPA to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. I am concerned that using unreliable benefit estimates could add unwarranted costs on power plants that could cause additional plants to shut down. I am informed that, in October 2010, NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Toxics Standards. *See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010)*. Given these concerns, would you support withdrawing the "willingness-to-pay survey" and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

2. I am informed that, in EPA's proposed 316(b) rule, EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For *entrainment*, it is my understanding that EPA adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each site. This seems appropriate. Yet for *impingement*, I am told that EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement. In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

3. During Administrator McCarthy's confirmation process, I expressed concerns about EPA's continuation of efforts to establish effluent limitation guidelines (ELG) for coalbed methane (CBM) production. In her responses to my QFRs, she wrote: "I understand the importance of your questions to natural gas producers in Alabama and elsewhere. I have not been directly involved in this CWA issue, but if confirmed, I look forward to working with you as EPA looks at this important issue under the CWA." Do you, also, commit to work with me and my staff on this issue and to keep us closely apprised of all EPA actions on this matter?

4. As outlined in my letter to the EPA dated May 10, 2012, the ELG process, which started in 2008, cannot be justified in light of prevailing economic conditions and the price of natural gas in today's market. Natural gas prices are much lower now than in 2008 when EPA started this process. Moreover, I am advised that there is no need for these ELGs because Alabama has successfully managed the National Pollutant Discharge Elimination System (NPDES) for more than 25 years with EPA regional supervision, and that an ELG is even less necessary now because of decreased gas and water production. A CBM ELG would threaten production across the country and could even end production in Alabama, thereby harming the great progress this country has made toward energy independence and progress in domestic natural gas

production. I appreciate EPA's response dated June 12, 2012, that acknowledges the ELG must be economically achievable. The EPA has been working on a proposed rule regarding effluent limitation guidelines (ELG) for CBM since 2008. During that time, natural gas prices have decreased significantly. I am told that this dynamic renders a CBM ELG economically unachievable. Rather than devoting additional time and resources to an effort that the EPA cannot justify - economically or on the merits - I encourage you to abandon any efforts to establish a CBM ELG. Please provide an update on this process. Does EPA intend to continue this ELG process even though EPA acknowledges that it cannot issue new guidelines if they are economically unachievable? What are the costs to EPA of the entire ELG process for coalbed methane? I am told that EPA has actively been working on the CBM ELG since 2007 including an extensive survey of companies and that, to date, no economic information has been provided to the public even though the Clean Water Act requires an economic feasibility test. When can stakeholders expect to see such an analysis?

Senator Roger F. Wicker

1. What do you think the geographic scope for the award of RESTORE Act funds should be and why?

2. How much control do you think the States should have over the selection of projects for the 35% of Gulf Coast Restoration Trust Fund contents that are to be divided among the Gulf States?

Senator John Boozman

1. As you know, the EPA has inappropriately released personal and confidential business information relating to concentrated animal feeding operations (CAFOs) to certain activist organizations. (*Amanda Peterka, EPA probes release of CAFO data to enviro groups, Mar. 6, 2013,* *http://www.eenews.net/Greenwire/2013/03/06/archive/2?term=EPA+probes+release+of=CAFO+data+to+enviro+groups*) Earlier this year, I asked the EPA whether Arkansans were directly impacted by the Agency's careless disregard for legitimate privacy concerns during this incident. The Agency responded that "Arkansas is one of the 19 states for which the data was either: (1) available to the public on websites, (2) is subject to mandatory disclosure under state or federal law, or (3) does not contain data that implicated a privacy interest; the data from these nineteen states is therefore not subject to withholding under the privacy protections of FOIA Exemption 6." This implies that Arkansans were directly impacted, but it leads to further questions and concerns. The EPA seems to claim that there was no legal obligation to keep the Arkansas-related information confidential. Even so, the release of this information to activist groups inappropriately paints a target on Arkansans. As you know, the Department of Homeland Security had previously informed the EPA that the release of such information could constitute a domestic security risk. Would you please explain your views on (1) whether it was appropriate for the Agency to release the personal and confidential business information of Arkansans to activist organizations, (2) whether the agency could have met its FOIA obligations in this case without directly releasing Arkansas-related information to activist organizations?

2. For many years, Congress has required EPA to support partnerships with non-federal entities, like the Water Systems Council, that help sustain safe drinking water sources for rural Americans who rely on groundwater. Please describe your views regarding the EPA's role in providing support for improved water quality and water systems to rural communities. Specifically, please address the EPA's role in supporting programs that provide training and technical assistance to citizens and communities that rely on individual water wells and small water well systems.

3. I'm sure you're familiar with OMB circulars that are provided to instruct agencies on the proper way to carry out regulatory analysis. For example, OMB Circular A-4 states that "a real discount rate of 7 percent should be used as a base-case for regulatory analysis." This circular also states that "analysis of economically significant proposed and final regulations from the domestic perspective is required, while analysis from the international perspective is optional." Do you believe it is important for agencies to follow OMB instructions to ensure that regulatory analysis is conducted in a consistent manner?

4. In assessing the benefits and costs of a regulatory policy, do you believe that EPA should evaluate domestic costs and domestic benefits separately from global/international costs and benefits? In other words, do you think standard practice should be to separate out the benefits to and costs to American citizens of a particular regulatory policy, so that those costs and benefits can be independently evaluated?

5. This Committee has heard testimony this year – from both scientists and policy-makers – that narrative nutrient criteria, properly structured, can effectively protect water quality to meet designated uses. If confirmed, would you seek to use EPA power or resources to impose numeric nutrient criteria on states? Or, if confirmed, would you support EPA cooperation with states that would prefer to maintain narrative nutrient criteria?

6. As you know, EPA Region 6 is working on the Illinois River Watershed Modeling Project with a possible TMDL process to follow in Arkansas and Oklahoma. Earlier this year, the States of Arkansas and Oklahoma signed a Second Statement of Joint Principles and Actions. This bi-state agreement provides a three-year extension of existing commitments – which have led to significant decreases in flow-adjusted monthly phosphorous loads over time – while the states jointly perform a stressor-response study, funded by the State of Arkansas and managed by a committee appointed, in equal numbers, by each state. The States of Arkansas and Oklahoma agree to be bound by the findings of the Joint Study. Specifically, Arkansas agrees to fully comply with the standard at the state line, whether the existing standard is confirmed or a new standard is established. Given this bi-state agreement, Senator Pryor, Congressman Womack, and I have urged the EPA to continue working on the model but to also postpone TMDL development until after the joint statement obligations are completed. Do you have any thoughts on this approach? And will you agree to work closely with our state officials on these types of issues?

7. Some activists seek to use Office of Water programs to address climate change by, for example, urging that resources be set aside for "green" water projects that reduce emissions. Do you believe that reduced emissions should be a higher priority for the Office of Water than clean water? Specifically, if forced to choose, would you rather spend limited resources on more-expensive projects that result in fewer emissions but also reduce water quality improvement capacity, or would you rather stretch tax dollars further to maximize the quantity and effectiveness of water quality protection infrastructure?

8. Too often the EPA takes actions that lead to distrust in rural farming communities. While most farmers want to be good stewards of land and water, they often distrust government programs, even voluntary programs, and rightfully so. EPA can make choices that seriously impact rural participation in voluntary conservation and environmental protection efforts. For example, hypothetically speaking, in helping to set-up voluntary nutrient trading programs, EPA could choose to support non-point source reduction verification through USDA-led (or state agricultural agency-led) verification of the implementation of best management practices by non-point sources that choose to participate. Or, EPA could choose to push for site-specific, "on-field" water quality monitoring. What are your thoughts on these issues, and what steps would you take to earn trust in rural and agricultural communities?

9. Will you initiate any interagency communications or coordination with USDA and other federal and state entities to ensure that the costs and burdens on American farmers and rural communities are fully considered by the EPA? If so, please describe any permanent protocols or practices that you would put in place to ensure that such communication and coordination continues throughout your tenure.

10. If confirmed, you will receive periodic oversight letters from the Environment and Public Works Committee. As the Ranking Member of the Water and Wildlife Subcommittee, I suspect that I will send you letters seeking information that is critical to the formulation of public policy. This oversight is critical as we seek to evaluate the effectiveness of government programs and policies, as we work to identify and eliminate wasteful government practices, and as we labor to eliminate fraud, corruption, abuse, and other forms of misconduct. Please describe your views regarding the importance of timely responses to legislative branch inquiries. If confirmed, what will you do to ensure that you and your office respond in a thorough and timely manner to legislative branch inquiries? Please be specific.

Senator Deb Fischer

Prior Converted Cropland

In response to one of my questions at your confirmation hearing, you stated, if a farmer changed the use of his or her prior converted cropland (PCC) from an agricultural to a non-agricultural use, the new use would need to fall under one of the Clean Water Act (CWA) 404(f) agricultural exemptions to avoid the need for a CWA permit. I believe your response is not consistent with EPA and Corps regulations or with judicial precedent.

In 2010 and 2011, the U.S. District Court for the Southern District of Florida vacated a nationally-applicable guidance issued by the Corps's Headquarters claiming that once PCC is converted from an agricultural use to a non-agricultural use, it ceases to be excluded from the CWA. In vacating the guidance, the court deemed the guidance to be in direct conflict with the EPA's and Corps's 1993 rule excluding PCC from the CWA because the rule's preamble provided that PCC remains PCC (and thus excluded from CWA requirements) regardless of use. In fact, the position explained by the joint EPA/Corps preamble was in response to a direct comment from the public asking whether a change in use results in the loss of PCC classification. The court concluded the guidance was a nationally applicable legislative rule promulgated without following the Administrative Procedure Act (APA). Unhappy with the court's ruling, the Corps sought to amend the judgment in 2011 in order to apply the guidance on a case-by-case basis. The court, again, instructed the Corps that it was not to make any wetlands determinations inconsistent with its prior order unless it changes the 1993 rule following APA notice and comment rulemaking procedures. The Corps did not appeal the decision. Both the 2010 and 2011 court orders are attached for your review.

1. Is EPA adhering to the district court ruling that enjoins the Corps from applying the "change in use" guidance nationwide? If not, please explain why?

2. If EPA is not adhering to the district court ruling, please explain to me what EPA's position is regarding the regulatory status of PCC that is converted to a non-agricultural use? Is EPA's position the same as the position you took at your confirmation hearing? Is it EPA's position that upon changing the use of prior converted cropland from an agricultural to a non-agricultural use, that land no longer qualifies as prior converted cropland and can be considered a "water of the United States" absent another exemption?

3. Will you commit to me that, if confirmed, EPA will not take a position that is different from the district court ruling discussed above unless and until EPA and the Corps change the 1993 rule following notice and comment rulemaking?

4. If you will not make such a commitment, please explain to me what authority EPA has to deviate from the position adopted in the 1993 rule.

5. Does EPA have any plans to adopt further guidance or go through a rulemaking to change the 1993 rule in order to impose a "change in use" limitation on the PCC exemption?

6. Do agricultural ditches on cropland that is PCC also qualify as PCC?

EPA's National Rivers and Streams Assessment

Thank you for committing to me that, if confirmed, you will ask EPA staff to relook at the way to set the benchmark when conducting the National Rivers and Streams Assessment. You also indicated

that the assessment is intended to address the question of "how well are we doing." To understand the approach you will take on this issue if confirmed as the Assistant Administrator, please respond to the following questions:

7. I believe the mission of EPA's Office of Water is to implement statutes enacted by Congress, including the Clean Water Act. Do you believe the Office of Water has other missions not authorized by statute?

8. In your view, is it appropriate for EPA's Office of Water to measure "how well we are doing" implementing the Clean Water Act by evaluating the condition of waters against a benchmark of streams that are least disturbed by human activity?

9. Do you consider it to be the mission of EPA's Office of Water to return rivers and streams to conditions that existed before human activity?

10. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

    Do you believe the Clean Water Act objectives under section 101(a) are a grant of authority to EPA to take actions to further those objectives, or do you believe EPA can implement the Clean Water Act only through specific authorities granted in other sections of the Act?

11. Do you agree that successful protection and maintenance of water quality is determined under the Clean Water Act by evaluating whether a water body is achieving water quality standards established by states and approved by EPA, which include a use designation and criteria to protect those uses?

12. Has a state designated any water body with the use of "least disturbed by human activity"?

13. Absent any water quality standards established to protect and maintain a use of "least disturbed," do you believe it is appropriate for the Office of Water to evaluate its success in implementing the Clean Water Act by assessing water bodies based on whether they match the conditions of "least disturbed" waters?

14. If you believe it is appropriate to conduct a National Rivers and Streams Assessment for a purpose other than implementation of the Clean Water Act, please identify your authority to expend federal dollars to conduct this assessment.

Science Advisory Board Panel on Water Connectivity

In March 2013, EPA requested public nominations of scientific experts to form a Science Advisory Board (SAB) panel to review the agency's draft science synthesis report on the connectivity of streams and wetlands to downstream waters.

15. What is the status of the nomination process?

16. Will EPA commit to including individuals nominated by agricultural, industry, and property rights representatives in order to ensure that the agency lives up to its promise of balanced SAB review panel?

17. Specifically, will EPA include the seven individuals Agricultural Retailers Association recommended to Dr. Thomas Armitage on June 7, 2013?

Immediate Judicial Review of Jurisdictional Determinations

18. EPA has recognized those who receive Clean Water Act compliance orders are entitled to immediate pre-enforcement judicial review under Administrative Procedure Act and the Supreme Court's decision in Sackett v. EPA. Given that jurisdictional determinations are similar to compliance orders in that they mark the agency's definitive ruling on Clean Water Act jurisdiction, obligate recipients to go through Clean Water Act permitting for discharges into "navigable waters," and fix the legal relationship between recipients and the EPA, will you recognize if confirmed that a property owner is entitled to immediate judicial review of jurisdictional determinations?

State Revolving Funds

19. I have been advised that if the annual Congressional capital grants to the Clean Water and Drinking Water State Revolving Funds (SRFs) are reduced to zero, the collective corpuses of the SRFs will diminish by 30% in 10 years. What is EPA's and the Administration's long-term plan and proposal for maintaining SRF capital grants to states on an annual basis, consistent with the policy of Section 101(a)(4) of Clean Water Act, to provide assistance to local governments with the huge costs to comply with federal combined sewer overflows and wastewater facility requirements?

Water Quality Standards Rulemaking

20. It is understood that EPA has requested permission from the Office of Management and Budget to amend the agency's Water Quality Standard Regulation as set forth in 40 CFR Part 131. What are the topics of that proposed regulation?

Effluent Limits for Storm Water Permits

21. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Consent Decrees

22. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

Spill Prevention, Control, and Countermeasure (SPCC) Plans

EPA officials have said farmers and ranchers need to determine if fuel storage on their farm and ranchers "would reasonably be expected" to discharge oil into waters of the United States. If so, they are then subject to the rule. But when questioned, EPA officials have refused to further define the

term "reasonably be expected" and only say farmers and ranchers should consider a worst case scenario.

23. Could you help my constituents by better defining when a "reasonable expectation" exists?

24. If a farmer determines a reasonable expectation for a spill to reach waters does not exist, what criteria will EPA use to evaluate whether it agrees with a farmer's determination?

25. What certainty do farmers and ranchers have that their determinations will be agreed to by EPA if inspected? (Nebraska Farm Bureau has heard from a member near Valentine who is 300 yards from the nearest ditch and miles away from the nearest stream; should that farmer "reasonably expect" a spill to enter a water of the U.S.?)

26. Does agriculture have a history of large oil or fuel spills?

    a. If not, why did EPA seek to include farms and ranches in the SPCC regulation?

    b. Can EPA justify the possibly significant compliance cost to farmers and ranchers given the lack of history of spills?

27. Because of the SPCC regulation, I have heard farmers and ranchers are now buying smaller fuel tanks to avoid the high cost of compliance. The smaller tanks mean fuel delivery personnel would likely need to deliver fuel more often (at a higher cost to the farmer) to meet the needs of their customers. Would you agree that large fuel trucks making more trips and spending more time on the road not only increases the potential for a spill from those trucks, but also increases the environmental impacts because of the increase in time spent on the road?

Duplicative Pesticide Permits

28. I would like to address the duplicative permitting requirement for pesticide applications. As you know, Clean Water Act permits are now required for certain pesticide applications that are already safely governed under the Federal Insecticide, Fungicide, and Rodenticide Act. I understand EPA has provided technical assistance to Congress on legislation to address this issue, and I hope the agency will continue to work cooperatively with Congress on this matter. If you are confirmed, will you support efforts to reduce the duplicative permitting requirement for pesticides?

CAFO Clean Water Act Permits for "Dust and Feathers"

It is my understanding EPA has been issuing enforcement orders compelling livestock and poultry farmers to seek a federal Clean Water Act permit for small, incidental amounts of dust, feed, feathers, and manure on the farmyard that could be washed away by rainwater, even if the farm is located a long way from any stream.

I want to be clear; I am not referring to manure piles or the production area where feed and animals are kept or manure storage facilities. The regulatory action in question relates to incidental amounts of feathers and dust blown from ventilation fans, or very small amounts of manure that can be tracked on a boot or tire and are commonly found on all farms.

29. Do farmers have to worry about controlling rainwater that falls on their barnyards that may carry very small amounts of pollutants into waters?

30. Do small amounts of dust, feathers, and manure found on any livestock farmyard require a federal permit when washed by rain into a stream?

31. Why isn't that just ordinary agricultural stormwater that is common to all farms and specifically exempted from regulation by the Clean Water Act?

32. Do farmers need to fear that, as Assistant Administrator, you intend to require federally mandated permits to regulate farm dust?

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22777-CIV-MOORE/SIMONTON

NEW HOPE POWER COMPANY and
OKEELANTA CORPORATION,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS and STEVEN L. STOCKTON,
in his official capacity as Director of Civil
Works, United States Army Corps of
Engineers,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION PURSUANT TO RULE 59(e) TO ALTER OR AMEND JUDGMENT; GRANTING THIRD PARTY MOTIONS TO INTERVENE

THIS CAUSE came before the Court upon Defendants' Motion Pursuant to Rule 59(e) to Alter or Amend Judgment (ECF No. 49), Intervenor Plaintiffs' Motion to Intervene (ECF No. 47), and Intervenor Defendants' Renewed Motion to Intervene (ECF No. 50). These motions are now fully briefed.

UPON CONSIDERATION of the Motions, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. MOTION TO AMEND JUDGMENT

A. Background

On September 29, 2010, this Court entered an Order granting in part Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment. See New Hope Power Co. v. U.S. Army

Corps of Engineers, 2010 WL 3834991 (S.D. Fla. Sept. 29, 2010).[1] In granting relief, the Court set aside the Stockton Rules and stated that "the Corps may not, without engaging in rulemaking using appropriate notice-and-comment procedures, determine the existence of wetlands in a manner inconsistent with this Order." New Hope Power Co., 2010 WL 3834991, at *9; see also Final Judgment (ECF No. 46) (same). Defendants now move to alter or amend this Order and Judgment pursuant to Fed. R. Civ. P. 59(e).

B. Standard of Review

"The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (citations omitted).

C. Analysis

Defendants' motion argues that this Court made three "manifest errors" of law: (1) that the four-factor test for granting an injunction was not met; (2) that the injunction granted was overbroad; and (3) that the injunction unduly restricts the Corps' lawful activities. Each of these arguments is addressed in turn.

1. Four-Factor Test

The Supreme Court recently held that:

> a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of

[1] The facts surrounding this case are discussed at length in that Order, and familiarity is assumed.

> hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010) (citation omitted). District Courts are not required to make explicit findings of fact as to the existence of these factors. Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408-09 (D.C. Cir. 1998). Here, each of the factors are met. Plaintiffs' injury was shown in that they were unable to construct an ash monofill that would save $1.4 million a year. New Hope Power Co., 2010 WL 3834991, at *6. No adequate monetary remedy is available.[2] While Plaintiffs face economic injury, the only hardship to Defendants is that they must engage in a notice-and-comment period which they are legally required to engage in before enacting new rules. Further, the public interest will be served by the benefits of participation in the notice-and-review process. Thus, this Court committed no manifest error in granting injunctive relief.

2. Broadness of Injunction

Defendants argue that this Court's injunction is overbroad in that it applies to all actions by the Corps, rather than simply to the restrictions placed on Plaintiffs or to individuals in this District. These arguments lack any basis.

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he

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[2] Defendants argue that the Court could have imposed milder relief by simply setting aside the Stockton Rules without restricting future action. However, Plaintiffs would not be adequately protected if the Corps could simply reenact the Stockton Rules. Thus, the relief, as crafted, was the least restrictive manner to insure that the notice-and-comment requirements were respected.

> is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Nat'l Min. Ass'n, 145 F.3d at 1409 (citation omitted); see also 5 U.S.C. § 706(2)(A) ("The reviewing Court shall . . . hold unlawful and set aside agency action . . . not in accordance with the law."). Thus, "Government-wide injunctive relief for plaintiffs and all individuals similarly situated can be entirely appropriate and it is 'well-supported by precedent, as courts frequently enjoin enforcement of regulations ultimately held to be invalid.'" Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17-18 (D. D.C. 2004) (collecting cases). Here, a rule of broad applicability was set aside because the new agency rules were enacted throughout the Corps without following the appropriate notice-and-comment procedures. Thus, broad relief was necessary.

Defendants rely on Va. Society for Human Life, Inc. v. Fed. Election Com'n, 263 F.3d 379 (4th Cir. 2001) in making their argument that relief should be limited to the harmed individual. This case runs counter to language in Lujan v. Nat'l Wildlife Fed, 497 U.S. 871 (1990), stating that where an agency action is validly challenged, the entire agency's program is impacted. Id. at 890 n.2; see also Nat'l Min. Ass'n, 145 F.3d at 1409; Doe, 341 F. Supp. 2d at 17-18. Additionally, as the D.C. cases note, broad relief avoids the danger of a flood of duplicative litigation. Thus, this Court committed no manifest error of law with respect to the broadness of the injunction.

3. Prevention of Lawful Agency Action

Defendants claim that this Court is restricting the Corps' future lawful actions with respect to wetlands determinations and that it has been enjoined from interpreting its own

regulations. Defendants overstate the degree to which they have been constrained. This Court did not rule that the Corps had no discretion to enact the Stockton Rules, that the Stockton Rules were unconstitutional, violated the scope of the Corps' statutory authority, or even that they were bad policy. The Court took no stance on any of these issues. Rather, the Court merely held that the Corps needed to follow the appropriate notice-and-comment procedures before re-enacting the Stockton Rules.

Further, Defendants fail to point to any "lawful action" that is being prevented. In Monsanto, 130 S. Ct. 2743, the case relied on by Defendants, the Animal and Plant Health Inspection Service was precluded from even partially deregulating use of a genetically engineered alfalfa variety until a complete environmental impact statement ("EIS") was performed regarding the variety. This was done even though under the National Environmental Policy Act of 1969, a partial deregulation decision may have been a valid alternative to an EIS. Id. at 2757. Here, Defendants have pointed to no parallel exception to the notice-and-comment requirements that would allow Defendants to re-enact part of the key changes created by the Stockton Rules: the extension of the Corps' jurisdiction to situations where prior converted croplands are converted to non-agricultural use, or where dry lands are maintained using continuous pumping. Without a parallel exception, Defendants are essentially arguing that they should have the discretion to further violate the notice-and-comment requirements. They have no such discretion. See 5 U.S.C. § 553(b). Thus, this Court committed no manifest error of law with respect to the degree to which the injunctive relief limits the Corps' actions.

II. MOTIONS TO INTERVENE

The Federal Rules of Civil Procedure provide that "[o]n timely motion, the court may

permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P 24(b). Here, both Intervenor Plaintiffs and Defendants[3] have claims that share a common question of law or fact. Intervenor Plaintiffs had another case pending that sought to set aside the Stockton Rules, which case has since been stayed because the Stockton Rules have been set aside. Whether this case is affirmed or reversed will significantly impact the outcome of that case. Intervenor Defendants are organizations with significant interests[4] in the Everglades, an area that will be impacted by the outcome of this case. Defendants' suggestion that the Intervenor Parties' motions are untimely is without merit. This case was decided promptly and the fact that the motions were made post-judgment does not suggest undue delay. Moreover, Intervenor Plaintiffs moved after their own case was stayed and Intervenor Defendants initially moved before the Summary Judgment Order in this case was entered. Moreover, no prejudice to the main Parties will result from the addition of the Intervenor Parties. Thus, the Motions to Intervene are granted.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants' Motion Pursuant to Rule 59(e) to Alter

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[3] The Intervenor Plaintiffs in this action are the American Farm Bureau Federation, United States Sugar Corporation, and National Association of Home Builders. The Intervenor Defendants are the National Audubon Society and Florida Audubon Society.

[4] These interests include conducting millions of dollars of research in the Everglades, providing organized field trips for the public in the Everglades, and frequently visiting it for science, education and recreational purposes.

or Amend Judgment (ECF No. 49) is DENIED. Intervenor Plaintiffs' Motion to Intervene (ECF No. 47), and Intervenor Defendants' Renewed Motion to Intervene (ECF No. 50) are GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of February, 2011.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22777-CIV-MOORE/SIMONTON

NEW HOPE POWER COMPANY, and
OKEELANTA CORPORATION,

Plaintiffs,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS and STEVEN L. STOCKTON, in his official capacity as Director of Civil Works, United States Army Corps of Engineers,

Defendants.
_____/

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT; DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment (ECF No. 18) and Defendants' Cross-Motion for Summary Judgment (ECF No. 27). These motions are now fully briefed.

UPON CONSIDERATION of the Motions, the Responses, the Replies, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

Plaintiffs in this case are Okeelanta Corporation ("Okeelanta"), a Florida sugarcane grower, and New Hope Power Company ("New Hope"), a renewable energy company. In this action, brought pursuant to the Administrative Procedure Act ("APA"), Plaintiffs allege that

Defendants United States Army Corps of Engineers ("the Corps") and Steven L. Stockton ("Stockton"), the Corps' Director of Civil Works, have improperly extended the Corps' jurisdiction under the Clean Water Act ("CWA") by enacting new legislative rules related to prior converted croplands[1] without allowing the required public notice period. Specifically, Plaintiffs allege that Defendants' new rules have improperly extended the Corps' jurisdiction to situations where (1) prior converted croplands are converted to non-agricultural use; and (2) dry lands are maintained using continuous pumping. Under this new rule, wetland determinations are made based on what the property's characteristics would be if the pumping ceased Therefore, Plaintiffs seek to have the new rules set aside.

A. History of the CWA

The CWA is a statute which seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Since 1972, pursuant to section 404 of the CWA, the Corps has regulated the "navigable waters" of the United States. See 33 U.S.C. § 1344(a). "Wetlands" are considered "navigable waters" that are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (emphasis added).

In 1977, the Corps released Final Rules that clarified that the phrase "under normal circumstances" in the regulation does not refer to properties "that once were wetlands and part of

[1] Prior converted croplands are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible." 58 Fed. Reg. 45008-01, at 45031.

an aquatic system, but which, in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37122, 37122 (July 19, 1977). Thus, former wetlands that were altered to dry land before the CWA's passage were exempted from the delineation of "wetlands."

In 1986, the Corps released a Regulatory Guidance Letter ("RGL") stating:

> [I]t is our intent under Section 404 to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The wetland definition is designed to achieve this intent. [] Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by 'normal circumstances' in the definition quoted above. 'Normal circumstances' are determined on the basis of an area's characteristics and use, at present and recent past. Thus if a former wetland has been converted to another use [other than by recent unauthorized activity] and that use alters its wetland characteristics to such an extent that it is no longer a 'water of the United States,' that area will no longer come under the Corps' regulatory jurisdiction for purposes of Section 404.

RGL 86-9 (Aug. 27, 1986) (ECF No. 18-10); see also RGL 05-06 (Dec. 7, 2005) (ECF No. 18-11) (stating that RGL 86-9 still applies).

B. Wetlands Manual

In 1987, the Corps released a Wetlands Delineation Manual ("Wetlands Manual") which Corps' personnel follow in making wetland determinations. See Defs.' Counter Statement of Facts ¶ 7 (ECF No. 27-9). According to the updated online edition of the Wetlands Manual, use of the 1987 Manual is mandatory in making wetlands determinations. See Wetlands Manual (ECF No. 18-13), at vii. The Wetlands Manual requires present evidence of wetland indicators as to the hydrology, soil and vegetation of the land to make "a positive wetland determination." Id. at v, 10. The Wetlands Manual provides an exception to this rule for atypical situations such as where unauthorized activities, natural events, or manmade wetlands are involved. Id. at 73-74.

A situation is not considered atypical where "areas have been drained under [the Corps'] authorization or that did not require [the Corps'] authorization." Id. at 74.

C. Prior Converted Croplands

In 1993, the Corps indicated in its regulations that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8). In a joint final rule by the EPA and the Corps, the agencies stated that:

> By definition, [prior converted] cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has the values that the area did in its natural condition. [Prior converted] cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the [CWA].

58 Fed. Reg. 45008-01, at 45032. Moreover, the agencies stated that:

> In response to commentors who opposed the use of [prior converted] croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas.

Id. at 45033. The only method provided for prior converted croplands to return to the Corps' jurisdiction under this regulation is for the cropland to be "abandoned," where cropland production ceases and the land reverts to a wetland state. Id.

D. Jacksonville Issue Paper

In January 2009, the Corps' Jacksonville Field Office prepared an Issue Paper announcing for the first time that prior converted cropland that is shifted to non-agricultural use becomes subject to regulation by the Corps. See Issue Paper Regarding "Normal Circumstances" (ECF

No. 18-22) (the "Issue Paper"). This paper was written in response to five pending applications for jurisdictional determinations involving the transformation of prior converted cropland to limestone quarries. The Issue Paper concluded that such a transformation would be considered an "atypical situation" within the meaning of the Wetlands Manual and, thus, subject to regulation. Id. at 1-5. The Issue Paper further found that active management such as continuous pumping to keep out wetland conditions was not a "normal condition" within the meaning of 33 C.F.R. § 328.3(b). This Issue Paper was sent to the Corps' headquarters along with a request for guidance as to whether the Issue Paper reflected the Corps' rules. The Issue Paper was adopted as being an accurate reflection of the Corps' national position by Stockton in an Affirming Memorandum. See Memorandum for South Atlantic Division Commander (Apr. 30, 2009) (ECF No. 18-23) ("Affirming Memorandum").[2] No notice-and-comment period occurred before this memorandum issued. The Corps has implemented and enforced the Stockton Rules nationwide since the Affirming Memorandum issued, and the Corps has issued additional memoranda supporting this policy.

E. New Hope's Proposed Ash Monofill

New Hope runs a renewable energy facility on Okeelanta's property. This property is located on a mill lot (the "Mill Lot") that was previously used to farm sugarcane. In 1993, the Corps indicated in a letter that the property was a prior converted wetland and thus, New Hope did not need a permit to build a renewable energy facility. See Letter from Charles A. Schnepel, Chief, Regulatory Section, the Corps' Miami Field Office to John M. Bossart, KBN Engineering

[2] The Issue Paper and Affirming Memorandum are collectively referred to as the "Stockton Rules."

(May 26, 1993) (ECF No. 18-3). This renewable energy facility was eventually built. New Hope now seeks to construct an ash monofill[3] near the renewable energy facility on the same Mill Lot. The hydrology of the Mill Lot is such that drains, pumps and other devices are used to prevent the area from becoming saturated with water.

On September 1, 2009, after the Corps became aware of the proposed construction, the Corps notified New Hope that "commencement of the proposed work prior to Department of the Army authorization would constitute a violation of Federal laws and subject [New Hope] to possible enforcement action." Letter from Krista Sabin, Project Manager, Jacksonville District Corps of Engineers to Rebecca Kelner, P.E., Jones Edmunds & Assocs. (Sept. 1, 2009) (ECF No. 18-33).

New Hope responded by asking whether the Corps' correspondence with New Hope established "the final decision on how these jurisdictional rules will be applied," and whether individual exceptions might apply. Email from Eric Reusch to Neal McAliley (May 29, 2009) (ECF No. 18-31). The Corps' Jacksonville field office responded that all projects which involved a change from agricultural to non-agricultural use would be assessed based on this approach. Id. In subsequent correspondence, the Corps indicated that "commencement of the proposed work [on the monofill] prior to . . . authorization [from the Corps] would constitute a violation of the federal laws and subject you to possible enforcement action. Receipt of a permit from the Florida Department of Environmental Protection . . . does not obviate the requirement for obtaining [the Corps'] permit prior to commencing the proposed work." Letter from Krista

[3] The ash monofill would essentially serve as a landfill for waste from the renewable energy facility. This would save New Hope the expense of shipping the waste elsewhere.

Sabin, Project Manager, Jacksonville District Corps of Engineers to Rebecca Kelner, P.E., Jones Edmunds & Assocs. (Sept. 1, 2009) (ECF No. 18-33).

On December 23, 2009, Plaintiffs filed the Complaint in the current action under the APA seeking to set aside the Stockton Rules. See Complaint (ECF No. 1). The Complaint alleges that the Stockton Rules improperly (1) create a new rule that wetland exemptions for prior converted croplands are lost upon conversion to non-agricultural use (Count I); (2) create a new rule for circumstances where dry lands are maintained using continuous pumping. Under this new rule, wetland determinations are made based on what the property's characteristics would be if the pumping ceased; (3) create a new interpretation that wetland exemptions for prior converted croplands are lost upon conversion to non-agricultural use (Count III); (4) create a new interpretation for circumstances where dry lands are maintained using continuous pumping (Count IV); (5) are unconstitutionally vague rules; and (6) create rules in excess of statutory authority. Plaintiffs now seek summary judgment in their favor on all claims, entitling them to relief in the form of setting aside and vacating the Stockton Rules. Defendants seek summary judgment on all claims, and dismissing the action.

II. JURISDICTION

A. Finality

Defendants allege that this claim must be dismissed because the challenged rules are not final. Plaintiffs bring this action pursuant to 5 U.S.C. § 704 of the APA, which provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the

> agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Plaintiffs claim that this section allows them to obtain review of Defendants' alleged violation of the notice-and-comment requirements found in 5 U.S.C. §§ 552-53.

Thus, the crux of the jurisdictional question is whether the agency action in this case is "final." The ambiguity of this word is well described in a recent journal article:

> Stated broadly, a decision is final when an agency concludes its process. A party will experience an agency decision, such as a guidance, as truly final, especially if the substance of that action reasonably compels that party to make meaningful changes to its conduct. An agency, on the other hand, may have a very different perspective, considering a matter final only when it has exercised any and every regulatory option pertinent to that issuance. These two perspectives do not meld easily.

Gwendolyn McKee, Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine, 60 Admin. L. Rev. 371, 373-74 (2008). To provide guidance in addressing this ambiguity, the Supreme Court has focused on two conditions which must be satisfied for agency action to be considered "final" for the purpose of APA review under section 704: (1) "the action must mark the consummation of the agency's decisionmaking process"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted); accord Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."); Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1248 (11th Cir. 2003) (looking at "(1) whether the agency action constitutes the agency's definitive position; (2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily

operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether pre-enforcement review will be efficient") (citing FTC v. Standard Oil of Cal., 449 U.S. 232, 239-43 (1980)).

Here, Plaintiffs argue that the Corps' changes in rules regarding prior converted croplands without a notice-and-comment period was improper.[4] The first Bennett prong, consummation of policymaking, is met here because the decision to implement the challenged policy has been completed using definitive language and no further modification of the policy is being considered. See, e.g., City of Dania Beach, Fla. v. F.A.A., 485 F.3d 1181, 1187-88 (D.C. Cir. 2007) (first prong met where nothing in agency letter suggested its "statements and conclusions are tentative, open to further consideration, or conditional on future agency action"). This conclusion is further bolstered by the fact that the challenged policy has now been in place for over a year and has been uniformly implemented throughout the United States.

The second Bennett prong, legal consequences, has also been met. Prior to the shift in policy caused by the Stockton Rules, prior converted croplands were exempt from CWA regulation unless they were abandoned. Following the issuance of the Stockton Rules, prior converted croplands are no longer automatically exempt from CWA – rather they will be subject to regulation where they are converted to non-agricultural use or where they involve continuous pumping. In other words, the Corps' central office has given the field offices their new "marching orders" using mandatory language with respect to prior converted croplands, which

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[4] As discussed in Section III, it is well settled that administrative agencies may only issue rules after following a notice-and-comment period 5 U.S.C. §§ 552-53; Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

the field offices are now implementing. Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that an agency guidance document had "legal consequences" when the agency "has given the States their 'marching orders'"); see also City of Dania Beach, Fla., 485 F.3d at 1188 (same); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 479 (2001) ("Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final.").[5]

Moreover, the remaining prongs cited by the Eleventh Circuit all suggest finality. See Tenn. Valley Auth., 336 F.3d at 1248. The third prong, immediate impact, is met because Plaintiffs' plans to begin preliminary construction of their monofill are being interrupted. The fourth prong is met because this case almost exclusively involves issues of law. The present challenge does not involve factual determinations, but rather the procedural sufficiency of the policy that the Corps seeks to implement. This determination only requires an analysis of undisputedly authentic Corps' documents. The fifth prong, effective pre-enforcement review, is met because the Court can finally decide the legal issues before it and completely resolve the dispute.

Defendants' counter-arguments are unpersuasive. Many of the cases they cite are inapplicable because they involve pre-enforcement lawsuits that challenged applications of Corps' regulations or legal rules rather than the enactment of Corps' regulations or rules themselves. See, e.g., Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586

[5] The Court acknowledges that some cases, also from the D.C. Circuit, have interpreted the second prong in Bennett more rigidly. See, e.g., Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8 (D.C. Cir. 2005). These cases apply Bennett so rigidly as to entirely preclude review of some types of agency actions. See McKee, Judicial Review, supra, at 400-02.

(9th Cir. 2008) (holding no jurisdiction existed where property owner challenged factual determination by Corps but no regulation was challenged); St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs, 314 F. Supp. 2d 1238 (S.D. Fla. 2004) (challenging the facts that formed the basis of a preliminary jurisdictional determination); Defendants' Brief in Opposition (ECF No. 26) ("Defs.' Opp'n"), at 13-21. These cases focused on the Bennett prong regarding lack of legal consequences, and found that the preliminary factual pronouncements of the field offices did not have legal consequences. Here, by contrast, the agency documents challenged were documents created by the Corps' headquarters and involved a pronouncement of new agency-wide legal rules directing how jurisdiction should be determined. The Stockton Rules cover an entirely new category of property and the Corps' field offices have been directed to follow these new rules, and the legal consequence is that Plaintiffs now have to follow rules that previously did not exist. Therefore, for all the above reasons, the Court finds that the Stockton Rules were a final agency action and the Court has subject matter jurisdiction over the claim.

B. Ripeness

Defendants next challenge the ripeness of Plaintiffs' claims. The Eleventh Circuit recently described the ripeness doctrine as follows:

> The ripeness doctrine is one of the several strands of justiciability doctrine that go to the heart of the Article III case or controversy requirement. While standing concerns the identity of the plaintiff and asks whether he may appropriately bring suit, ripeness concerns the timing of the suit. The function of the ripeness doctrine is to protect federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. To determine whether a claim is ripe, we assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review. The fitness prong is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed. The hardship prong asks about the costs to the complaining party of delaying review until conditions for

deciding the controversy are ideal.

Mulhall v. UNITE HERE Local 355, --- F.3d ----, 2010 WL 3526078, at *8 (11th Cir. Sept. 10, 2010) (ellipses, quotation marks and citations omitted). Here, Defendants argue that Plaintiffs' claim are not yet ripe because (1) additional facts would benefit the Court, and (2) Plaintiffs will suffer no hardship if they cannot seek immediate review. Defs.' Opp'n at 21-25. With respect to the first argument, this Court does not believe that additional site-specific information regarding Plaintiffs' property is necessary to resolve this case. Any administrative review would only involve the new rules' applicability to the facts of Plaintiffs' case, and not involve a review of the policy itself. Plaintiffs nowhere dispute the fact that if the new rules apply, then the subject property would qualify as wetlands. Thus, the issue before the Court is one of law, and factual development would not assist the Court. As to the second prong, a real and heavy burden is being placed on Plaintiffs by Defendants' actions. According to uncontested evidence, creation of the ash monofill would save New Hope $1.4 million a year. The Corps' shift in policy is the only current barrier to commencing construction of the monofill. Thus, a delay in review of this claim would be highly expensive to Plaintiffs. Therefore, considering these two factors, this Court finds Plaintiffs' claims to be ripe for adjudication.

III. MERITS

A. Standard of Review

The applicable standard for reviewing a summary judgment motion is stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. Twiss v. Kury, 25 F.3d 1551, 1554 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id.

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Id. However, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

B. Analysis

Plaintiffs allege that Defendants improperly issued new agency rules without using the appropriate notice-and-comment procedures required by the ADA. The ADA provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). It further requires that

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553(c). The notice-and-comment requirements contained in 5 U.S.C. §§ 553 are not mere formalities. As the D.C. Circuit has observed, "the notice requirement improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review." Sprint Corp. v. F.C.C., 315 F.3d 369, 374 (D.C. Cir. 2003).

The notice-and-comment requirements apply to all agency rules, which are defined broadly as "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. §§ 551(4), 553. The exceptions to the notice-and-comment procedures include agency rules that are "interpretative rules, general statements of policy, or rules of agency organization, procedure." 5 U.S.C. § 553(b)(3)(A).

Here, Defendants do not claim that the Corps engaged in the appropriate notice-and-comment procedures. Rather, they argue that the Stockton Rules are mere policy statements that are not subject to notice-and-comment requirements. Plaintiffs claim that the Stockton Rules limit the discretion of Corps' field offices to such a degree that they constitute legislative rules. In trying to distinguish between legislative rules and policy statements, courts have found that "if a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely

upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." General Elec. Co. v. E.P.A., 290 F.3d 377, 383-84 (D.C. Cir. 2002). Similarly, courts look to whether the agency establishes a new "binding norm." Nat'l Min. Ass'n v. Sec'y of Labor, 589 F.3d 1368, 1371 (11th Cir. 2009). "The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case." Id. (citation omitted); see also Cmty. Nutrition Inst., 818 F.2d at 946 (looking at the binding nature of the document and whether it leaves the agency's decisionmakers with discretion). Courts also look to the agency's expressed intention, "whether the statement was published in the Federal Register or the Code of Federal Regulations," and the statement's binding effects on private individuals. Id.

In the present action, there has been a definite shift in the Corps' substantive rules regarding what the Corps considers wetlands. As noted above, before the Stockton Rules, prior converted cropland that was shifted to non-agricultural use was treated as exempt. Following the Stockton Rules, the opposite was true. Similarly, prior to the Stockton Rules, continuous pumping to preserve a converted cropland's state did not impact a property's entitlement to a prior converted cropland designation. Following the Stockton Rules, the opposite was true. Thus, the Stockton Rules broadly extended the Corps' jurisdiction and sharply narrowed the number of exempt prior converted croplands.

Defendants argue that no such shift occurred. Defendants argue that prior converted croplands that changed to non-agriculture use are an atypical situation which leads to loss of exemption. This position is inconsistent with prior agency documents. The Corps' regulations state that "[w]aters of the United States do not include prior converted cropland." 33 C.F.R.

§328.3(a)(8). In the related final rule by the EPA and the Corps, the only means for this status to be lost is abandonment, which requires the land to revert to a present wetlands state. See 58 Fed. Reg. 45008-01, at 45033. In other words, under the prior rule, an exemption would not be lost because a prior converted cropland shifts to nonagricultural use. See, e.g., United States v. Hallmark Const. Co., 30 F. Supp. 2d 1033, 1040 (N.D. Ill. 1998) (holding that even if prior converted cropland had switched to nonagricultural use, no wetland designation existed); RGL 86-9 ("if a former wetland has been converted to another use [other than by unauthorized use] . . . that area will no longer come under the Corps' regulatory jurisdiction"). Moreover, no mention was made of whether the converted state was preserved by pumping or otherwise. Thus, the Corps' new rule creates a second exception, in addition to abandonment, whereby prior converted croplands can lose their exempt status.

Additionally, the new rule also breaks from the plain language of the Wetlands Manual, which is by its terms binding on the field offices. The Wetlands Manual requires that, before an area is designated a wetland, the Corps must find present evidence of wetland indicators as to the hydrology, soil and vegetation. Wetlands Manual at v, 10. The only and exclusive exceptions to this generally applicable definition are atypical situations where unauthorized activities, natural events, or manmade wetlands are involved. Id. at 73-74. Though the Corps attempts to shoehorn the Stockton Rules regarding conversion to non-agricultural usage under the atypical situations exceptions section, none of the existing exceptions include the conversion of prior converted cropland to non-agricultural uses. The only remotely pertinent atypical situation exception is for unauthorized activities, but by its terms, the exception for unauthorized activities does not apply where "areas have been drained under [the Corps'] authorization or that did not require [the

Corps'] authorization." Id. at 74. It is undisputed that Plaintiffs' prior converted croplands did not require the Corps' authorization when they were originally drained, and so this atypical exception does not apply.

Defendants also argue that continuous pumping to preserve a non-wetland state is not a "normal circumstance" within the meaning of 33 C.F.R. § 328.3(b); rather, the normal state must be judged by what conditions would return if pumping ceased. This position is impossible to reconcile with prior agency positions, including the repeatedly reaffirmed position that many "wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such natural circumstances are not what is meant by 'normal circumstances'." RGL 86-9 (Aug. 27, 1986); RGL 05-06 (Dec. 7, 2005) (stating that RGL 86-9 still applies).[6] Similarly, Defendants' position is contradicted by the Wetlands Manual's requirement that the Corps only looks at present evidence, or evidence from the recent past, to make wetlands determinations. No provision exists in the manual to determine hypothetical conditions that may return upon abandonment when examining "normal circumstances."

Defendants also argue that Stockton does not even have the power to implement new final rules, and thus the Stockton Rules could not create a binding new norm. The record makes

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[6] Defendants cite to RGL 90-07 (ECF No. 26-6), which expressly re-affirms the "normal circumstances" definition contained in RGL 86-9, but notes that unauthorized active pumping used to destroy recently existing wetlands characteristics cannot be used to eliminate wetlands jurisdiction. Such a scenario would be an atypical situation under the Wetlands Manual because it involves an unauthorized use of pumping. The pumping covered by the Stockton Rules, by contrast, includes authorized pumping such as pumping on prior converted croplands that have long been exempt from regulation. Thus, RGL 90-07 does not support Defendants' position.

clear that, whether or not Stockton has the authority to implement new rules, he has done so.[7] Defendants have admitted that the Stockton Rules are the Corps' current policy. If anything, Defendants' argument suggests that the new rules should be set aside because rules that are normatively binding are emerging from unauthorized individuals. Thus, for all the above reasons, the Stockton Rules constitute new legislative and substantive rules, and create a binding norm. Therefore, the Stockton Rules and their progeny were procedurally improper because no notice-and-comment procedures were used. Accordingly, the Stockton Rules must be set aside.[8]

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction and for Summary Judgment (ECF No. 18) is GRANTED IN PART. The Court hereby SETS ASIDE the Corps' Issue Paper Regarding "Normal Circumstances" (ECF No. 18-22) and Memorandum for South Atlantic Division Commander (Apr. 30, 2009) (ECF No. 18-23) in their entirety. The Corps may not, without engaging in rulemaking using appropriate notice-and-comment procedures, determine the existence of wetlands in a manner inconsistent with this Order.[9] It is further,

ORDERED AND ADJUDGED that Defendants' Cross Motion for Summary Judgment

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[7] Similarly, the Court does not afford much weight to the fact that the Stockton Rules were not published in the Federal Register or the Code of Federal Regulations, as the very issue in front of the Court is whether the Corps circumvented use of rulemaking formalities.

[8] Because this analysis of Claims One and Two are sufficient to decide the issue before the Court, the Court does not reach the remaining claims.

[9] Plaintiffs' request for injunction is mooted by the granting of final relief.

(ECF No. 27) is DENIED. Plaintiffs' Motion for Hearing (ECF No. 33) is DENIED AS MOOT. All other pending motions not otherwise ruled upon are DENIED AS MOOT. The Clerk of the Court is instructed to CLOSE this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of September, 2010.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

July 25, 2013

James Jones
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Mr. Jones:

Thank you for appearing before the Committee on Environment and Public Works on July 23, 2013, at the hearing entitled, "Hearing on the Nominations of Kenneth Kopocis to be Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency (EPA), James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the EPA, and Avi Garbow to be General Counsel for the EPA." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer, Carper, Vitter, Crapo, and Fischer for the hearing record. Please submit your answers to these questions by 10:00 AM, July 29, 2013, to the attention of Mara Stark-Alcalá, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Mara_Stark-Alcala@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact Grant Cope of the Majority Staff at (202) 224-8832, or Bryan Zumwalt of the Minority Staff at (202) 224-6176 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

Environment and Public Works Committee Hearing
July 23, 2013
Follow-Up Questions for Written Submission

Questions for Jones

Questions from:

Senator Barbara Boxer

1. Mr. Jones, can you please describe your views on the importance of the EPA using every available tool in its tool box to protect public health from dangerous chemicals?

2. Mr. Jones, the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention plays a key role in enforcing strong ethical and scientific protections that safeguard people from dangerous tests involving pesticides.

    a. If confirmed, do you commit to make the enforcement of these protections a priority and to have a zero-tolerance approach to any violations of these important safeguards?

3. Mr. Jones, do you believe that the administration's TSCA reform principles should be considered in TSCA reform legislation?

Senator Thomas R. Carper

1. Mr. Jones, you've said that the public has the right to expect that the chemicals found in products that they use are safe and provide benefits without hidden harm. As you know, this Committee is currently considering various proposals for reforming toxics legislation. I am very hopeful that we can move forward with a package of reforms, and while I have some concerns about it, I believe that the compromise legislation drafted by Senator Lautenberg and Ranking Member Vitter is a good place to start. That being said, as with much of what we are tasked with in this Committee, passing a bipartisan reform bill will be difficult. In the absence of TSCA reform, what are the prospects for EPA's effective assessment of chemicals in the marketplace, and effective regulation of any chemicals that are found to have negative impacts on human health or the environment?

2. In the past, it's been EPA's position that for any TSCA reform effort to be effective, EPA must have the tools to quickly and efficiently obtain information from manufacturers that is relevant to determining the safety of chemicals. I agree that good and complete information must be central to any reform effort. But I also know that some companies are wary of minimum requirements for data, which could compromise proprietary business information. Could you talk a little bit about how you'd recommend striking a balance between the need for information with this sensitivity of chemical products manufacturers?

3. Like many federal agencies, EPA has taken a fairly big budget hit in recent years. If TSCA reforms are successful, I am concerned about EPA's ability to implement them considering a limited budget. Similarly, I am concerned about resources being shifted from other programs, such as the clean air programs that are so important to ensuring the air we breathe is healthy. Could you comment on this challenge, and how you'd work to address it?

Senator David Vitter

Topic: Confidential Business Information (CBI)

1. EPA recently sent to OMB a Notice of Proposed Rulemaking to amend the PMN regulations to prohibit companies from protecting chemical identity in health and safety studies, unless to do so would reveal process or concentration information. If implemented, any company that invested hundreds of thousands of dollars, or perhaps millions, on research and development to create new and innovative chemistries that don't fall within these two exceptions that EPA would recognize (e.g. surfactants; reactive products) would have to reveal those confidential chemical identities.

    a. Can you comment on the potential for this policy to have an adverse impact on innovation and the economy?

2. Mr. Jones, if I read EPA's interpretation of Section 14(b) correctly, the Agency believes that it does not have the authority to protect confidential chemical identities except when that information would reveal process information or concentration in a mixture.

    a. Is this correct?

3. If EPA's interpretation is correct, that would suggest that the Agency was acting beyond its authority for more than 30 years. Alternatively, if EPA's new interpretation of Section 14 is not correct, the Agency is about to embark on actions that it is not authorized to do under the statute.

    a. Has the Office of General Counsel at EPA analyzed these questions about EPA's authority? What has OGC concluded?

4. Mr. Jones, while I am generally supportive of EPA's goals for providing the public better access to information about chemicals, I am very concerned about certain aspects of the Agency's current stance on CBI. In 2010 EPA announced a policy shift in its interpretation of Section 14(b) of the Toxic Substances Control Act (TSCA) and plans to deny claims for confidential chemical identity in health and safety studies except where disclosing that identity would also disclose process information or concentrations in a mixture or formulation. This narrow interpretation of the statute's protection of CBI is a direct contradiction of more than 30 years of EPA's own legal and policy position as well as legislative history. It is also inconsistent with 5 other federal environmental statutes enacted between 1972 and 1986, all of which provide for disclosure of health and safety effects information while still protecting confidential chemical identities. In fact, even EPCRA, the Right-to-Know statute allows confidential chemical identity to be protected in a health and safety study.

    a. Can you please comment on EPA's more recent interpretation of TSCA's CBI provisions and why the Agency now thinks TSCA should treat confidential chemical identity differently than it's treated under the other five federal environmental statutes?

Topic: Endocrine Disruptor Screening Program (EDSP)

5. As you know, the extensive suite of EDSP Tier 1 screens is very costly (up to $1 million per chemical) and several of them have come under significant criticism from a technical perspective. Computational toxicology methods and high throughput screens hold great promise for increasing efficiency and reducing the use of animal testing in the EDSP.

a. How will the Agency ascertain confidence in the use of ToxCast prediction models and the results they generate for decision making in the EDSP, including use for prioritization?

6. When the EDSP was first being developed, a joint committee of EPA's Science Advisory Panel (SAP) and SAB recommended that after the initial round of EDSP screening, the Agency should analyze the results and conduct an independent scientific review, with an eye towards revising the process and eliminating those EDSP screening methods that may be found to be flawed. The SAP is now reviewing and analyzing the results and experiences gained from this first round of EDSP testing, to learn which assays are working well and which are not and to leverage this information to support the development of an improved EDSP, before requiring testing of additional chemicals.

    a. Will EPA review the SAP analysis before requiring testing of additional List 2 chemicals?

Topic: EPA's Design for the Environment (DfE) Safer Product Labeling Program

7. Congress gave EPA authority under the TSCA to require labeling or otherwise restrict the use of chemicals if EPA determines that the use of the chemical presents or will present an unreasonable risk of injury to health or the environment. This means evaluating public exposure and doing a traditional risk assessment that is made available for public comment.

    a. Given that the DfE program is not evaluating likely public exposure and risk, is EPA trying to end run a congressionally mandated program through this labeling program?

8. Currently, EPA does not allow products with the DfE logo to use packaging that contains bisphenol A, or BPA. This conclusion is at odds with the FDA, which considers exposure and risk. According to the FDA, BPA is safe in food contact materials.

    a. Why doesn't EPA defer to FDA on this point since FDA has actually looked at public exposure and risk while EPA has not?

    b. How is the public supposed to rectify this inconsistency?

9. Do you have any idea of the benefits or costs of this program?

10. Isn't this another reason why you should not be proceeding with this program?

11. Does EPA look at the likelihood of actual public exposure in determining which products are "safer" under this program?

12. If EPA does not look at the likelihood of actual public exposures, than how does EPA determine which products actually pose lower or higher risks?

13. Couldn't this labeling program be more hurtful then helpful?

14. Isn't it possible that another product on the shelf could actually pose a lower risk – that is, be safer – than the product with the DfE label?

15. Aren't you then misleading consumers?

16. The regulatory process has built-in protections to prevent arbitrary and capricious action by agencies.

    a. Why should American consumers have the content of their products determined by a judgment of EPA made outside of the regulatory process?

    b. Why does EPA seek to operate outside of that framework?

    c. Will you commit to a rulemaking process to establish the standards and procedures for the alternatives assessment?

17. Under the DfE Safer Product Labeling Program, EPA evaluates products and grants the manufacturer the right to put a DfE Safer Chemistry label on the product if it meets the DfE criteria.

    a. What is EPA's authority for this labeling program?

    b. Did Congress ever specifically authorize EPA to conduct this labeling program that would deem some products to be safer than others? [The Pollution Prevention Act authorizes EPA to provide information and technical assistance to businesses, but does not include authority for a safe product-labeling program.]

18. Under the Organic Food Production Act of 1990, Congress explicitly granted the USDA authority to establish a "USDA Organic" label. Similarly, under the Energy Independence and Security Act of 2007 Congress explicitly granted EPA and DOE the authority to conduct the "Energy Star" labeling program for appliances.

    a. Why did EPA believe it could proceed without Congressional authority to establish this labeling program given its potential to affect markets?

    b. Don't you think we would have explicitly authorized a consumer product-labeling program if we intended EPA to have this authority?

19. Why wasn't the DfE Safer Program Labeling Program and standards developed in accordance with the Administrative Procedures Act rulemaking requirements?

20. The APA defines a "rule" to include "an agency statement of general or particular applicability" that "implement, interpret or prescribe law or policy."

    a. Don't you believe that the establishment of criteria that says one product is safer than another constitutes a "rule" under that definition?

    b. Why did EPA not place any notices in the Federal Register to alert the public as required by the APA?

    c. Why did EPA simply assume everyone would know to look for a DfE website?

    d. Do you think this upholds the Administration's commitment to transparency and open government?

e. Will you commit to full transparency for the DfE program?

Topic: Formaldehyde

21. In 2010, Congress unanimously passed the "Formaldehyde Standards for Composite Wood Products Act" directing EPA to develop a formaldehyde standard that implements, on a national level, the world's most stringent standard developed by the California Air Resources Board (CARB). In a proposed rule-making conducted pursuant to the Act, the Agency has expanded the definition of laminated products to include fabricators as manufacturers of hardwood plywood composite wood products. This proposed expansion of the definition of laminated products deviates dramatically from the California standard and would create a significant burden for a number of domestic industries by requiring duplicative testing of the same product previously tested by the original manufacturer while providing no additional environmental or health benefit. This deviation from the California rule is not only duplicative and overly burdensome, but in my opinion the definitional expansion is contrary to the intent of Congress in passing the Act.

    a. Can you commit to work with me to ensure that this proposal is modified to conform to the intent of Congress and what EPA ultimately implements is the California standard?

22. In the Formaldehyde Emissions Standards for Composite Wood Products rule, proposed on June 10, EPA notes (in its fact sheet) that it "anticipates that the proposed rules will encourage the ongoing trend by industry towards switching to no-added formaldehyde resins in products." While we recognize that Congress provided limited discretionary authority in the Formaldehyde Standards for Composite Wood Products Act, your statement highlights a serious concern that EPA is reaching beyond its authority to distort the marketplace by pushing de-selection of certain chemistries or technologies in the proposed rule. Congress mandated this regulation, including a set of emissions standards that clearly set forth a performance-based approach for regulating formaldehyde emissions from composite wood products, irrelevant to the type of chemistry or technology used.

    a. Why is it appropriate for EPA, under its TSCA authority, to be giving preferential regulatory treatment to a particular chemistry?

    b. If Congress were to reform TSCA, why should we not expect a program that reflects this propensity for picking winners and losers?

23. The EPA's proposed Formaldehyde Emissions Standards for Composite Wood Products rule references throughout its Preamble and in supporting documentation the most recent draft EPA formaldehyde IRIS assessment when opining on potential health impacts.

    a. Given the fact that the NAS reviewed and provided a significant critique on the EPA's draft IRIS assessment, would you agree that it is not appropriate to refer to that draft given the major methodological and evidenced-based limitations the NAS identified in the draft assessment and the roadmap it outlined for significant improvements?

Topic: Lead Bullets

24. In 2010, EPA denied a petition by environmental groups to regulate lead in ammunition and fishing tackle under TSCA. I strongly agreed with EPA's denials of that petition and have been alarmed to see renewed discussion of this effort by certain folks within the environmental community.

b. It seems clear to me that EPA does not have the authority to regulate ammunition under TSCA, would you agree with that?

c. Can you give me an update on whether you have seen any compelling information that would change the Agency's opinion on the need to regulate lead in fishing tackle?

25. Mr. Jones, a number of US states have initiated regulatory activities directed at specific chemical substances, or intended to allow the state to identify chemicals of concern or "high priority" chemicals.

a. Do you see a benefit to EPA from your staff being able to share with such states confidential business information that EPA has received from industry submitters with respect to chemical substances, including those chemicals that might be under consideration by regulatory authorities in those, or other states?

b. Would sharing confidential business information with the states require amendments to TSCA?

c. If TSCA were amended in that respect, how would the Agency assure the submitters of CBI that their trade secrets can be practically safeguarded by the states against problems our nation is experiencing with safeguarding trade secrets and cyber security?

Topic: Phthalates Alternatives Assessment

26. I understand that the DfE program is currently conducting an assessment of phthalates and that your website states "The goal is for the resulting information to help inform the process of substituting safer alternatives, with reduced health and environmental concerns, for these phthalate chemicals." This would appear to indicate that EPA has already made a judgment that phthalates pose a significant risk that is higher than the likely alternatives.

27. Is this true?

28. Has EPA evaluated the risk from likely alternatives?

29. If not, isn't the Agency being arbitrary and capricious and possibly reckless in this labeling program?

30. Will you commit that the phthalates alternatives assessment will be a fair and objective assessment of the risks of the alternatives.

Topic: TSCA Work Plan Chemical Assessments

31. EPA has started the peer review of the first TSCA Workplan Assessment, Trichloroethylene (TCE). Thus far the review has not provided any opportunities for true public engagement and dialogue with the peer review panel. In fact it is unclear whether the peer reviewers have any obligation to consider public input at all. When asked direct questions about this, and other substantive comments, the peer review chair ignores questions from the public.

a. Can you explain why the Agency and its peer reviewers have been so vague in their communications with the public regarding not only the public opportunities to engage in peer review but also regarding the substance of the assessments?

32. In addition, EPA has not answered direct questions regarding whether or not these assessments will be refined before being used to inform regulatory determinations.

    a. Can you tell me the agencies plans regarding these assessments?

    b. Will further refinements be made before they are used to inform regulatory actions?

    c. Why hasn't your office taken steps to clarify how these assessments are used?

33. The transparency and openness we would like to see from your office appears to be missing.

    a. What steps will you take to improve your relationships and communications with stakeholders?

Senator Deb Fischer

Endangered Species Act Consultations for Pesticides

1. Given that over the 40 year history of the Endangered Species Act, EPA and the Fish and Wildlife Services and National Marine Fisheries Services have not successfully completed a consultation that resulted in a label change, do you believe it appropriate EPA try to solve this deficiency on a selective product-by-product basis that relies on spatial (geographic) bans of product us or significant non-wind-directional buffers that have the long-term potential to decrease land value, arable land available for production, global competitiveness, and production of row crops themselves?

2. Do you intend to follow this same approach that takes significant U.S. cropland out of production to address this lack of consultation process for every product that goes through registration or re-registration?

3. Have you evaluated the impact on U.S. agricultural production and our economy of such an approach?

Questions with Senator Mike Crapo:

Endangered Species Act Consultations for Pesticides

On April 30, a Committee on the National Research Council of the National Academy of Sciences (NAS) made detailed recommendations concerning revisions to the process by which EPA and the Fish and the Wildlife Service or the National Marine Fisheries Service assess risk during the consultation under the Endangered Species Act (ESA) for specific pesticide registration actions taken by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Administration requested this review in March 2011 "to review scientific and technical issues that have arisen as our departments and agencies seek to meet their respective responsibilities under ESA and FIFRA."

4. Do you believe that the NAS review has achieved its mission?

5. Do you believe that there is more work to be done? Are there other outstanding issues that must be resolved at the intersection of ESA and FIFRA? Do other scientific, technical and policy questions remain?

6. Given the complexities involved, could the development of a response to the NAS report be improved with a public stakeholder process that brings together all parties to work-through those outstanding and unresolved inter-agency policies and procedures?

7. We believe that there is an opportunity here to address years of regulatory frustration and to do so in a way that provides regulatory certainty to all parties. The Administration's letter to the National Academy of Sciences described this issue as "scientifically complex and of high importance." We would like your assurance that you will do your part to pursue and implement a comprehensive process for addressing these scientifically complex and important issues.

    a. Has the Administration formulated its official response to the NAS report—a "roadmap" if you will—now that the report has been public since April?

b. **When might that plan become public?**

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

July 25, 2013

Avi Garbow
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Mr. Garbow:

Thank you for appearing before the Committee on Environment and Public Works on July 23, 2013, at the hearing entitled, "Hearing on the Nominations of Kenneth Kopocis to be Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency (EPA), James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the EPA, and Avi Garbow to be General Counsel for the EPA." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer, Vitter, Inhofe, and Fischer for the hearing record. Please submit your answers to these questions by 10:00 AM, July 29, 2013, to the attention of Mara Stark-Alcalá, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Mara_Stark-Alcala@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact Grant Cope of the Majority Staff at (202) 224-8832, or Bryan Zumwalt of the Minority Staff at (202) 224-6176 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

Environment and Public Works Committee Hearing
July 23, 2013
Follow-Up Questions for Written Submission

Questions for Garbow

Questions from:

Senator Barbara Boxer

1. Mr. Garbow, you spent several years in private practice working for the law firm WilmerHale.

    a. Would you say that this law firm works on behalf of clients from industry?

    b. What did you take away from your experience working at WilmerHale in terms of better understanding businesses' perspective on issues?

2. Mr. Garbow, can you describe the factors that you will use to determine whether to advise your client to settle a law suit that is filed by industry or environmental groups against the EPA?

    a. Can you also please describe considerations that arise when EPA is sued over missing mandatory deadlines to issue rules, and whether courts order timelines for Agency action in such cases?

    b. Lastly, is it your understanding that any agency rules must comply with the law, including going through notice and comment rulemaking that allows all interested parties an opportunity to participate in the decisions making?

Senator David Vitter

Topic: Ethics

1. In a November 4, 2010, email to an EPA colleague about a citizen-suit lawsuit filed by Sierra Club and WildEarth Guardians alleging that EPA had failed to meet a statutorily-defined deadline, EPA Region 6 Administrator Al Armendariz wrote, "If needed, I can call Jeremy [Nichols] at WEG [WildEarth Guardians] and grab R6 [EPA Region 6] an extended deadline." Armendariz's curriculum vitae states that he worked as a "technical advisor" to WildEarth Guardians, and it also lists Jeremy Nichols, Director of the WildEarth Guardians' Climate & Energy Program, as a reference. At the time (November 4, 2010) Armendariz had been at EPA Region 6 for almost a year, and WildEarth Guardians had a number of pending lawsuits alleging EPA's non-compliance with statutorily defined deadlines.

    a. What is EPA policy on recusal during on-going litigation?

    b. Does EPA know the extent to which Administrator Armendariz conducted settlement negotiations with Jeremy Nichols?

2. On March 12, 2013, I sent a letter to EPA regarding Dr. Al Armendariz's participation in EPA's permitting of the Las Brisas Energy Facility. As you are aware, Dr. Armendariz was an opponent of the facility before he joined EPA and later joined the Sierra Club's "Beyond Coal" campaign. In correspondence obtained by the Committee, Armandariz wrote that "Gina's new air rules will soon be the icing on the cake, on an issue I worked on years before my current job." This letter was sent four months ago, and I understand that it was in final draft form in May.

    a. Why has EPA so far failed to send a response to this letter?

    b. Why was Armandariz permitted to work on the Las Brisas permit, in light of his prior vocal opposition to the project?

    c. Wasn't this an obvious conflict of interest that EPA should have easily identified?

    d. Please list all entities in which Dr. Armendariz had an identified conflict-of interest.

    e. What are EPA's criteria for identifying a conflict-of-interest?

    f. After a conflict-of-interest was identified, how was Dr. Armendariz screened from working on covered projects?

    g. Why was Layla Mansuri, an attorney, permitted to work on the Las Brisas permit in light of her previous advocacy against the project prior to her employment at EPA?

    h. Can you commit to me that as General Counsel you will implement a policy that will prohibit an appointee from working on a project that they were actively involved in prior to their service at EPA?

3. On May 15, 2013, I sent a letter to Assistant Administrator Michelle DePass inquiring about her compliance with her ethics pledge. In her pledge, she promised to resign her position as Program Officer with the Ford Foundation upon confirmation. Ms. DePass was confirmed on May 12, 2009, however, she was employed at the Ford Foundation until July 23, 2009.

a. Why was Ms. DePass permitted to continue as an employee at the Ford Foundation AFTER her confirmation and contrary to her pledge?

4. The Committee has identified several examples of EPA employees failing to adhere to EPA's Standards of Ethical Conduct. In the first instance, it appears that former Regional Administrator Al Armendariz and Associate Regional Administrator Layla Mansuri (an attorney) were inappropriately involved in decisions related to the Las Brisas Energy Center, despite their paid advocacy against the facility before their employment at EPA. Additionally, the Committee is concerned that Michelle DePass, Assistant Administrator for the Office of International and Tribal Affairs, violated the clear terms of her ethics pledge when she continued to work at the Ford Foundation after she was confirmed to her position at EPA. These and other potential violations are very serious matters that compromise the integrity of the Agency.

   a. As the Agency's Chief Ethics Officer, will you commit to working with the Committee to eliminate these types of ethical lapses?

   b. In addition, will you commit to publishing on a public website all ethics filings of senior officials within both EPA headquarters and regional offices?

5. While Dr. Armendariz has resigned his position from EPA, Layla Mansuri and Chrissy Mann are still employed by Region 6. Both of these individuals represented entities opposed to the construction and permitting of the LBEC.

   a. Has EPA identified conflict-of-interest for either Ms. Mansuri or Ms. Mann?

   b. Please list all topics in which EPA has identified a conflict-of-interest.

   c. Has either Ms. Mansuri or Ms. Mann worked on any matter related to the LBEC?

   d. Has either Ms. Mansuri or Ms. Mann worked on the development of the NSPS rule for greenhouse gases for new power plants Electric Generating Units?

Topic: FOIA

6. According to documents obtained by the Committees, EPA readily granted FOIA fee waivers for environmental allies, effectively subsidizing them, while denying fee waivers and making the FOIA process more difficult for states and conservative groups. Most recently, 12 states have joined in litigation against the EPA to force the Agency to turn over documents relating to sue and settle agreements. So far EPA has steadfastly denied the states very detailed requests.

   a. Why has EPA unilaterally denied Fee Waiver Requests to states and local entities?

   b. Does EPA take the position that states will never be able to demonstrate that they have met the criteria to obtain a fee waiver?

   c. Stated another way, can you envision a scenario wherein EPA grants a state's Fee Waiver request?

   d. If EPA can envision a scenario where a state can obtain a fee waiver, please explain why Oklahoma and 11 other states have failed to satisfy that criteria.

7. Myself, along with Senator Inhofe and Chairman Issa sent EPA a letter on May 17, 2013, reiterating the request made by the states. We have yet to receive a response from EPA.

    a. When can we expect to receive EPA's response to this letter?

8. It is my understanding that Congress – as a coequal branch of government – does not need to request a fee waiver to obtain documents from the executive branch.

    a. Do you agree with this statement?

    b. If so, there should not have been a delay – certainly a delay this long – for EPA to begin processing our request. Why has EPA delayed in its response to the May 17, 2013 letter?

    c. Will you commit to doing all that is within your power to expedite a response to this request?

9. During your confirmation hearing I asked you about an EPA email that discussed a standard protocol for responding to FOIA requests. In this email an EPA attorney, Geoffrey Wilcox, instructed that one of the first steps is to alert the requestor that they needed to narrow the request because it is overbroad, and secondarily that it will probably cost more than the amount they agreed to pay. I asked you if such a "standard protocol was appropriate?" You replied that it was not. Moreover, I requested that you follow up on what actions, if any, the Agency had taken to correct this behavior and you committed to do so for the record.

    a. Accordingly, I request that you provide me with an update on any corrective action EPA has taken to address this matter.

10. In May, I sent a joint letter with Chairman Issa asking EPA to provide our offices with "All FOIA fee waiver requests submitted to EPA between January 21, 2009 and May 16, 2013." This production should include all requests for an appeal. All response letters from EPA to requestors for FOIA fee waivers sent between January 21, 2009, and December 31, 2012, including all responses to an appeal. All EPA materials used to train FOIA officers on processing requests for FOIA fee waivers. I am still waiting for a response.

    a. Can you provide a reason as to why EPA has not yet provided this information to the Committees? What is that reason?

    b. Isn't it true that these records, by their nature, do not contain any deliberative or other privileged material as they are correspondence between the Agency and an outside entity?

    c. Will you commit to me to do all that you can to expedite responding to this request back at the Agency?

11. The Committee has uncovered multiple instances of mis-management of the Agency's obligations under the FOIA. These problems range from the apparent bias in assessing applications for fee waivers, to the unauthorized release of private information of Americans to environmental allies, to the inappropriate application of FOIA exemptions. As the General Counsel, you will play an instrumental role in improving the Agency's performance on this front.

While Acting Administrator Perciasepe committed to following the yet to be issued recommendations of the Inspector General, implementing these reforms should be a top priority.

a. Will you commit to aid the Committee in its oversight efforts, and to take all necessary steps to address these defects within the Agency?

12. The office of General Counsel is responsible for the Agency's compliance with internal guidelines as well as transparency statutes, such as the Federal Records Act, and the Freedom of Information Act. On March 18, 2013, I sent a letter along with Chairman Issa to Region 9 Administrator Jared Blumenfeld asking him to certify that he had not used his personal email to conduct Agency business. As you are aware, EPA policy explicitly prohibits such activities as it interferes with the Agency's record keeping capabilities. To date, I have not received a response from Mr. Blumenfeld, or from the Agency, answering the very simple question. EPA's response sent on April 9, 2013, fails to respond the actual question posed.

a. Accordingly, what actions have you or the office of General Counsel taken to ensure that Mr. Blumenfeld was and is not using his personal email address to conduct Agency business?

b. Has the Office of General Counsel conducted any sort of investigation to determine whether or not Mr. Blumenfeld did in fact use his personal email to conduct Agency business?

c. If the Agency did in fact learn that Mr. Blumenfeld had been using his personal email account to conduct Agency business, what corrective actions were taken?

Topic: Sue and Settle

13. According to a recent survey, since 1993, 98 percent of EPA regulations (196 out of 200) pursuant to three core Clean Air Act programs (NAAQS, NESHAP, and NSPS) were promulgated late, by an average of 5.68 years (or 2,072 days) after their respective statutorily defined deadlines. If EPA is out of compliance with all its deadlines, then clearly the Agency has limited resources relative to their statutory responsibilities. Establishing a deadline, therefore, also establishes EPA's priorities. In at least two instances, EPA and environmentalist organizations have litigated to either limit or prevent intervention by state or local officials in settlement discussions.

a. Given that the Congress expressly stipulated that environmental policymaking by EPA be performed in cooperation with the States, is it appropriate for the Agency to establish its priorities with environmentalist organizations in settlement negotiations that exclude the input of local officials and representatives?

14. OGC lawyers, together with attorneys in the U.S. Department of Justice's Environment and Natural Resources Division, represent the Agency in court. DOJ rules stipulate that, "It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons (natural or corporate) who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court." Neither EPA nor the Department of Justice allow for public notice and comment of consent decrees or settlement agreements pursuant to the litigation alleging EPA failed to meet non-discretionary duties under

the CWA. Rather, DOJ publishes in Federal Register only notice of settlement agreements/consent decrees engendered by enforcement actions.

a. Would EPA OGC commit to implementing the policy of its partners at the DOJ, and agree to allow for public notice and comment for CWA settlement agreement and consent decrees pursuant to deadline suits, in addition to enforcement actions?

Topic: Human Resources

15. Has EPA ever conducted training for use of the People Plus time tracking software?

16. Is the Agency currently implementing new time and attendance policies? Please identify what these new policies are.

17. Please outline EPA's policy on how to manage an underperforming employee.

Topic: Chemical Safety Board (CSB)

18. Congress established the Chemical Safety Board as a non-regulatory, independent investigatory body yet recently EPA has been attempting to subpoena CSB witness statements and records.

a. Under what legal authority has EPA determined it has access to the CSB's investigatory records?

b. Does EPA believe it should follow the Memorandum of Understanding between the Agency and the CSB?

Topic: Fuel Economy

19. What is your opinion on the application of EPCA to EPA's GHG authority and fact that *Mass vs. EPA* may have found authority to regulate but did not require it?

20. When does EPA intend to issue a response to the Alliance/Global ZEV waiver petition for reconsideration filed in March of this year?

21. Will the mid-term review be completed before the President leaves office?

Topic: CWA

22. Do you agree that the CWA does not regulate the flow of water?

23. Do you agree that EPA can require permits under Section 402 of the CWA only for discharges of pollutants from a point source to a "water of the United States"?

24. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in *VA Dept. of Transportation v. EPA* (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

Senator James Inhofe

1. As EPA's General Counsel, would you commit to EPA posting on its website copies of all complaints filed against EPA as a result of notices of intent to sue?

2. As EPA's General Counsel, would you commit to EPA posting on its website copies of any proposed consent decrees 30 days before submitting them to a court of law?

3. Out of all the rules for which EPA has deadlines, how many of them have been met? And, how many of those deadlines have been missed?

4. Do you believe that under the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix) EPA's Science Advisory Board (SAB) is authorized and obliged to respond to congressional inquiries from relevant committees of substantive jurisdiction about its activities?

5. Can you commit to this Committee that, as EPA General Counsel, you will review all pending requests for information from Congress to EPA's Science Advisory Board (SAB) and will clearly communicate to the members of the SAB that it is appropriate and obligatory that they respond to such inquiries in a timely manner?

6. Continuing Job Losses Analysis (321(a)): Since 1977, section 321(a) of the Clean Air Act has required "the Administrator to conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." EPA has never conducted a section 321(a) study to consider the impact of Clean Air Act programs on jobs and shifts in employment. The §321 requirement is different than the requirement from Executive Order 12866 that EPA consider in a Regulatory Impact Analysis (RIA) what impact a single proposed rule will likely have on jobs. For §321, EPA has to consider the impact that existing Clean Air Act requirements- taken as a whole- have had on job losses and shifts in employment throughout our economy. RIAs, by contrast, only consider the potential future employment impact that a single proposed rule will have. Therefore, EPA's preparation of RIAs for new rules does not satisfy §321(a).

    a. Has EPA ever conducted a study or evaluation under section 321 of the Clean Air Act? If so, when and, as EPA's General Counsel, would you commit to EPA posting on its websites, copies of those studies and/or evaluations?

    b. As EPA's General Counsel, would you commit to complying with section 321 of the Clean Air Act and ensuring that EPA evaluates on a continuing basis how air quality regulations, taken as a whole, affect jobs and shifts in employment?

7. Sue and Settle: "Sue and settle" occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public. As a result of the "Sue and Settle" process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by OMB and

other agencies, reviews under Executive Orders, and review by other stakeholders – at the critical moment when the agency's new obligations are created. For the past four years, EPA has actively engaged in settlements with environmental advocacy groups that result in new commitments to write rules on specified timetables and to undertake other new activities.

a. Would you support efforts to improve the transparency of this process and allow affected parties, including states and industry, to participate in the process, including settlement negotiations, to ensure that all interests are represented?

b. As EPA's General Counsel, what would you do to ensure that the agency does not agree to deadlines through settlements that do not provide sufficient time for EPA to meet its obligations under the Administrative Procedure Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, OMB Circular A-4, and other requirements that apply to EPA?

c. In a recent denial of several environmental groups' petition for a rulemaking under the Clean Air Act, Acting Administrator Robert Perciasepe stated that, "[e]ven under the best circumstances, the EPA cannot undertake simultaneously all actions related to clearly determined priorities as well as those requested by the public, and so the agency must afford precedence to certain actions while deferring others.... The EPA must prioritize its undertakings to efficiently use its remaining resources."

i. How do you prioritize the rulemakings that EPA decides to pursue?

ii. Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's priorities as to the rulemakings that it undertakes?

iii. Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's budget

8. Cooperative Federalism is also a major concern of mine, especially as it is related to the Clean Air Act.

a. Will you commit to working to improve the "cooperative" nature of "cooperative federalism" so that the EPA works with states instead of against them?

b. Will you commit to approving Federal Implementation Plans only after the EPA has exhausted all of its resources to remedy a State Implementation Plan?

Senator Deb Fischer

Numeric Effluent Limits

1. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Consent Decrees

2. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 29 2013

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Barbara Boxer
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Chairman Boxer:

Thank you for the opportunity to respond to the questions for the record following the July 23, 2013, hearing entitled, "Hearing on the Nominations of Kenneth Kopocis to be Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency (EPA), James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the EPA, and Avi Garbow to be General Counsel for the EPA." The attached documents have responses to the questions. I hope that this information is useful to you and the members of the committee.

If you have any further questions, please contact me or your staff may call Sven-Erik Kaiser in my office at (202) 566-2753.

Sincerely,

Laura Vaught
Associate Administrator

Attachment

Questions for the Record
July 23, 2013 Hearing on the
Nomination of Kenneth Kopocis to be Assistant Administrator
for the Office of Water of the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. The Office of Water is responsible for administering two of the nation's most important infrastructure investment programs- the Clean Water and Safe Drinking Water State Revolving Funds (SRFs). Unfortunately, infrastructure in this country continues to decline. The American Society of Civil Engineers rates our wastewater and drinking water infrastructure a "D."

Boxer 1a. Do you commit to work with this Committee to ensure that we are adequately investing in the Nation's wastewater and drinking water infrastructure?

Response: Yes. I agree with you that wastewater and drinking water infrastructure are critical assets that sustain the quality of our surface waters and our drinking water. If confirmed, I look forward to working with the committee to identify ways to best meet our nation's significant drinking water and wastewater infrastructure challenges.

Boxer1b. Even in the tight budget times that we face, will you work to ensure EPA continues to place a priority on investment in the State Revolving Funds?

Response: Yes. I believe the Clean Water and Drinking Water State Revolving Funds are critical sources of support for our communities as they work to protect human health and achieve our nation's clean water goals. If confirmed, I will work closely with the committee and with my colleagues at the EPA to prioritize investments in the Clean Water and Drinking Water State Revolving Funds.

Boxer 2. EPA recently released an integrated planning framework to help cities comply with stormwater and wastewater requirements. The framework ensures cities will reduce harmful pollution and comply with the Clean Water Act but does so in a flexible manner that allows local governments to address the worst problems first and prioritize investments.

Boxer 2a.. Do you believe this is a successful model that EPA can use to work with municipalities to reduce pollution?

Boxer2b. If confirmed, will you work with state and local governments to promote the use of this framework around the country?

Response to Boxer 2a-b: Yes. I believe an integrated planning approach to addressing our nation's stormwater and wastewater challenges is effective in helping to prioritize our investments in water infrastructure and more effectively achieve our clean water goals. I know

the EPA's Office of Water is currently working closely with the EPA's Office of Enforcement and Compliance Assurance, with the EPA's ten Regional offices, with states, and with communities across the country to promote an integrated planning approach. If confirmed, I look forward to working closely with these stakeholders to further advance such an approach.

Boxer 3. It is critical that EPA use the best available science when implementing federal laws, such as the Safe Drinking Water Act, and carrying out policies to protect water quality in lakes and rivers.

Boxer 3a. Could you please describe the importance that you place on ensuring the use of the best available science in making decisions under the Clean Water Act and Safe Drinking Water Act?

Boxer 3b. If you are confirmed, will you ensure that the Agency continues the use of the best available science in making decisions about safe drinking water and clean rivers and lakes?

Response to Boxer 3a-b: I believe that science is and should be the foundation of the EPA's decision making under the Clean Water Act and Safe Drinking Water Act. Both laws place significant emphasis on ensuring that the EPA works to protect America's drinking water and surface water in ways that are based on the best available science. If confirmed, I commit to making science the cornerstone of the EPA's work to provide clean drinking water and to restore and maintain the chemical, physical, and biological integrity of our nation's waters.

Boxer 4. Mr. Kopocis, the majority of your career has been spent here in Congress, including working as a member of the staff of this Committee. You worked on numerous bipartisan initiatives, including the successful passage of the Water Resources Development Act of 2007.

Boxer 4a. If confirmed, what experiences and lessons from your congressional career will you bring to the Office of Water?

Boxer 4b. What is your perspective on how the Office of Water can work best with this Committee and the Congress?

Response to Boxer 4a-b: My career on Capitol Hill was critical in shaping my understanding of clean water issues and in reinforcing our need to work together to address our nation's clean water challenges. Working for the Committee on Environment and Public Works, and elsewhere in the Congress, strengthened my commitment to working on a bipartisan basis to craft compromise and make progress. I believe that the EPA and the Congress can be partners in achieving clean water results, and if confirmed, I commit to building a strong partnership with the committee in achieving the goals of the Clean Water Act, Safe Drinking Water Act, and other laws implemented by the Office of Water.

Boxer 5. Will you follow the Safe Drinking Water Act in establishing a drinking water standard for perchlorate?

Response: Yes. If confirmed, I commit to learning more about the status of the agency's work to develop a drinking water standard for perchlorate, including the advice recently provided to the agency by the Science Advisory Board, and will work with Administrator McCarthy to ensure that the agency develops an appropriate and protective drinking water standard for perchlorate.

Senator Vitter

Topic: "Waters of the United States" Guidance Document

Vitter 1. During this past week's nomination hearing, I thought your answer to my question regarding the statutory authority for the Clean Water Act (CWA) draft Guidance was unclear.

Explain the Environmental Protection Agency's (EPA) statutory authority to conduct "Guidance" on what constitutes "waters of the United States"?

Response: In the Clean Water Act, the Congress did not define the term "waters of the United States," leaving the term to the EPA to define. The EPA is the final authority on determining the scope of Clean Water Act jurisdiction, and the EPA has in the past taken steps to define the term "waters of the United States" in regulation and to clarify it as necessary in guidance. The EPA and the Corps of Engineers, who implements the Clean Water Act Section 404 permitting program, have relied on this authority to promulgate regulations and to issue clarifying guidance since the Clean Water Act was first enacted in 1972. Most recently, the Bush administration issued waters of the U.S. guidance in 2008 clarifying the effect of the Supreme Court decision in *Rapanos* and in 2003 clarifying the Supreme Court decision in *SWANCC*.

Vitter 2. It is also my understanding that under the draft Guidance, the Army Corps of Engineers and EPA would assert jurisdiction over tributaries, meaning "a natural, man-altered, or man-made water body" with an ordinary high water mark and including ditches that "drain natural water bodies (including wetlands) into the tributary system of a traditional navigable or interstate water."

Vitter 2a. Does this regulatory assertion apply to virtually any ditch through which water flows?

Response: I understand the significance of this issue, particularly for the nation's farmers and for irrigators who rely on ditches to convey drainage or irrigation waters. The draft guidance would clarify that not all ditches are subject to regulation after the Supreme Court decision in *Rapanos*. Ditches, for example, excavated in uplands and that drain only uplands, or that do not connect to other waters of the U.S., are not subject to the Clean Water Act.

Vitter 2b. If not, how does the Guidance's purported tributaries jurisdiction comport with the plurality's opinion in Rapanos (which emphasized that jurisdictional waterbodies must be described "in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes'" (Rapanos, 547 U.S. at 739)), and with Justice Kennedy's concurrence in Rapanos (which recognized that "the breadth of [a] standard ... regulat[ing] drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it ... precludes its adoption" *(Rapanos,* 547 U.S. at 781 (Kennedy, J., concurring))?

Response: I appreciate the importance of this issue as the agencies work to implement the *Rapanos* decision consistent with the law. As the agencies' 2008 guidance did, the draft

Guidance clarifies that, after *Rapanos*, Clean Water Act jurisdiction over tributaries includes all "Traditional Navigable Waters" (TNW) and "Interstate Waters" and waters demonstrated on a case by case basis to have a "relatively permanent" flow of water (Plurality standard) or which possess a "significant nexus" with a TNW (Kennedy standard).

Vitter 3. The draft Guidance asserts that the precursor statutes to the CWA "always subjected interstate waters and their tributaries to federal jurisdiction."

Vitter 3a. Given that for a century prior to the CWA courts "interpreted the phrase 'navigable waters of the United States' in the [CWA's] predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible to being rendered so," *(See* Rapanos v. United States, 547 U.S. 715, 723 (2006) (plurality opinion)) is this assertion in the Guidance accurate?

Response: I recognize that this is an important legal question. If confirmed, I will raise this issue with the EPA General Counsel, the Department of the Army, and the Department of Justice to ensure that the guidance reflects their legal counsel. I will look forward to working with you as we clarify this issue.

Vitter 3b..Isn't it instead true that all interstate waters have never been subject to federal control, and that the exercise of federal jurisdiction over all interstate waters has no legal basis?

Response: I recognize that this is an important legal question. If confirmed, I will raise this issue with the EPA General Counsel, the Department of the Army, and the Department of Justice to ensure that the guidance effectively reflects their legal counsel. I will look forward to working with you as we clarify this issue.

Vitter 4. During your confirmation hearing you were asked about the following statement in an EPA fact sheet titled "Agriculture Exemptions Remain:" "This guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted cropland, or practices for identifying waste treatment systems and prior converted cropland." Referring to this statement in the fact sheet, Senator Fischer asked you about the status of the exemption for prior converted cropland. You testified that there is no attempt in the draft guidance or in any documents currently under consideration to in any way adversely affect the current exemption for prior converted cropland.

Vitter 4a. Is the same true for exemptions for waste treatment systems?

Response: It is my understanding that the agencies are not considering any changes to the waste treatment system exemption.

Vitter 4b. Is EPA attempting in the draft guidance or in any documents currently under consideration within the Agency (including a proposed rule, draft guidance, permit, or enforcement action) to in any way adversely affect the current exemption for waste treatment systems?

It is my understanding that the agencies are not considering any action that would adversely affect the application of the waste treatment system exemption.

Topic: EPA's Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters

Vitter 5. Mr. Kopocis, your office, the Office of Water, has requested the Office of Research and Development (ORD) to develop a report on the connectivity of streams and wetlands to downstream waters. I am told ORD confirmed that the draft report is COMPLETED and awaiting transmittal to the Science Advisory Board (SAB) panel for its review.

Vitter 5a. Under the Administrator's pledge, made during her confirmation hearings, to increase transparency, will you commit to releasing the report immediately so that the public can begin its review?

Vitter 5b. What public interest is served by embargoing the report?

Vitter 5c. I understand it is a large and complex report but what harm would there be in that approach?

Vitter 5d. Who decides whether the now completed draft should be made available to the public?

Response to Vitter 5a-d: I believe that transparency is a critical element of the EPA's work, especially in ensuring that its scientific products are of high quality. I understand that the draft science synthesis report drafted by the EPA's Office of Research and Development will be released soon by the EPA's Science Advisory Board. I share your commitment to transparency, and will commit to you that I will work with the Office of Research and Development, if confirmed, to ensure that the SAB conducts a robust scientific review and public comment process on the draft report and to ensure that the report is based on the best science.

Topic: EPA's Conductivity "Benchmark"

Vitter 6. While the U.S. District Court for the District of Columbia set aside EPA's conductivity "benchmark" that it had applied to Appalachian streams in the case of *NMA* v. *Jackson,* EPA recently published several papers supporting its conductivity actions, and has stated that it is in the process of developing a conductivity water quality criteria. In the past, EPA has failed to address scientific critiques that have produced evidence that conductivity is not a good indicator of benthic/aquatic health.

Vitter 6a. Going forward, what plans does EPA have to take this growing number of studies into account?

Response: I am unfamiliar with the specific studies outlined in your question. However, the agency continues to believe that conductivity is a high quality and cost effective water quality

measure that can help identify potential harm to the biological integrity of streams. I would be pleased to work with you, if confirmed, to learn more about the studies you reference and to ensure that the agency continues to base its work on the best, independently peer reviewed science.

Vitter 6b. How does EPA intend to convert a field-based study performed in Appalachian waters into a national standard?

Response: The EPA has made no decision at this time regarding how it may apply the peer-reviewed scientific research it has conducted in Appalachia on a national basis. I can assure you that any future agency action in this area would be subject to public comment and peer review.

Topic: EPA's Authority Under Section 404(c) of the CWA

Vitter 7. In March, 2012, the U.S. District Court for the District of Columbia struck down EPA's retroactive revocation of a mining-related CWA Section 404 permit, holding unequivocally that EPA has no authority to retroactively veto CWA Sec. 404 permits issued by the U.S. Army Corps of Engineers. However, EPA appealed that decision and in April of 2013, the U.S. Court of Appeals for the District of Columbia reversed the decision of the District Court.

What do you think the practical effect on industry will be of having Section 404 permits subject to EPA's veto authority even years after permit issuance and even if the permittee is in full compliance with the terms of the permit?

Response: I understand the important concerns raised by your question regarding the use of the EPA's Clean Water Act authorities and potential effects on the nation's business community. If I am confirmed, I look forward to working with you to ensure that the final court decision is implemented consistent with the law and in careful consideration of the issues you raise.

Vitter 8. During deliberations on the CWA in Congress, Senator Muskie noted that there are three essential elements to the CWA. These are "uniformity, finality, and enforceability." EPA Administrator Gina McCarthy likewise acknowledged the importance of providing permittees with a sense of finality upon permit issuance.

Vitter 8a.. How will you, in your capacity of Assistant Administrator of Water, work to implement the CWA in a manner that provides uniformity and finality throughout EPA's regulatory programs and permitting decisions.

Response: I appreciate your concerns regarding the importance of providing permittees with a sense of finality when their permits are issued. If confirmed, I will work to implement the Clean Water Act to provide the uniformity, finality, and enforceability that are so important in our regulatory programs.

Vitter 8b. How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

Response: I appreciate your concerns regarding the importance of providing permittees with a sense of finality when their permits are issued. If confirmed, I will work to implement the Clean Water Act to provide the uniformity, finality, and enforceability that are so important in our regulatory programs.

Vitter 8c. Have you considered what effects EPA's actions might have on state Surface Mining Control and Reclamation Act (SMCRA) permitting programs?

Response: It is very important to me that EPA implements its responsibilities in coordination with our federal, state, and local partners, including our partners in state and federal SMCRA permit programs. If confirmed, I will make respectful coordination with our partners an Agency priority.

Topic: EPA's Draft Bristol Bay Watershed Assessment and Pebble Mine

Vitter 9.. The EPA's Bristol Bay Watershed Assessment looks to be a potential precursor to an unprecedented veto of a mining project even before the project proponent has had a chance to submit a permit application. Along with other Committee members, I recently asked the agency to explain what harm would result from the Agency allowing the normal regulatory process to play out, instead of its current approach of speculating on hypothetical mining scenarios. EPA's July 16, 2013, response contended that abandoning the prejudicial assessment and allowing the CWA and National Environmental Policy Act (NEPA) procedures to play out would "increase uncertainty among Bristol Bay stakeholders," even though it is EPA's prejudicial evaluation of the Pebble Mine project that caused the uncertainty in the region.

Vitter 9a. Why does EPA feel it cannot evaluate a project solely on its merits and only once an actual permit application is submitted?

Response: I appreciate your question and the need to provide certainty and predictability in the permit process. I understand that the agency began the Bristol Bay assessment in response to petitions from Alaskans concerned about potential impacts to valuable commercial, recreational, and subsistence resources. The EPA has expressed its intent to complete the assessment by the end of the year to avoid unnecessary delay. I believe that the information included in the assessment will be extremely helpful to other state and federal agencies, permit applicants, and the public as future large scale development in the watershed is considered. If confirmed, I look forward to working with you to use the final assessment in an effective and constructive manner.

Vitter 9b. List and explain all economic impact analyses the Agency has done in the region.

Response: The Bristol Bay Assessment is designed to evaluate the ecological resources of the watershed and assess potential environmental impacts resulting from future large scale development.

Vitter 9c. Specifically, can you speak to the unemployment rate and poverty-associated challenges that may or may not be alleviated for people in that part of Alaska with the mine as a potential income source – or is this a factor that EPA's analysis does not address?

Response: I appreciate your question and the importance of jobs and a healthy economy to communities in Bristol Bay and throughout Alaska. The challenge is to balance the contribution that large scale mining related economic development can have with the costs and impacts of such development on the valuable commercial, recreational, and subsistence salmon fishery in the watershed. The EPA is eager to provide relevant scientific information which can help to inform future decision making in the region. If confirmed, I look forward to working with our federal, state and local partners on these important issues.

Vitter 10. EPA's July 16, 2013, letter also called for the Pebble Mine proponents to submit their final mine plan.

Does EPA believe that project proponents do not have a right to decide for themselves when it is appropriate to begin the permitting process and when to submit their own permit application?

Response: I agree that project proponents should decide for themselves when it is best for them to submit an application for a Clean Water Act permit or to prepare a mine plan. In the current situation, it is my understanding that the ongoing EPA Bristol Bay Assessment should not prevent submission of a permit application or mine plan if the mining operator chooses to do so. If confirmed, I look forward to working with you to further clarify this issue as necessary.

Vitter 11. You indicated in your oral testimony that EPA "chose to not favorably respond" to a petition to preemptively veto the potential Pebble Mine project in Alaska. Your answer appears to leave open the possibility that EPA may still favorably respond to the petition at some point and preemptively veto the project before the project proponent submits its permitting applications.

Has EPA decided once and for all that it will not preemptively veto the Pebble Mine project?

Response: It is my understanding that the EPA has made no final decisions regarding use of the agency's 404(c) authority at Bristol Bay and will not do so until the final Assessment is completed. The agency has completed only 13 actions under Clean Water Act section 404(c) since enactment of the Clean Water Act in 1972 reflecting how carefully the EPA considers any potential use of this authority. I understand the importance of this issue to you and, if confirmed, look forward to keeping you informed as the Assessment is completed.

Vitter 12.. Also during your oral testimony, and in response to my question regarding how much money EPA has spent to date on the Bristol Bay Watershed Assessment, you indicated that EPA estimates it has spent through earlier this year approximately $2.4 million in external costs, but you did not know of an estimate of the internal costs to EPA.

Vitter 12a.. Is it true that EPA lacks an estimate or accounting for the internal costs spent on the watershed assessment?

Vitter 12b. If not, please provide the estimate.

Response to Vitter 12a-b: It is my understanding that an accounting of the total costs associated with the Bristol Bay Assessment will be conducted at the conclusion of the study. If confirmed, I will provide you with that information, including a summary of internal costs, when the study is completed. I appreciate the importance of this issue at a time when the agency is working hard to reduce expenses and assure taxpayers that their tax dollars are being spent wisely.

Topic: Proposed Rule for Cooling Water Intake Structures under Section 316(b) of the CWA and EPA's "Stated Preference Survey"

Vitter 13. Unlike programs for other media, water impacts are specific to the conditions present in individual waterbodies.

Vitter 13a. Given this premise, will the final Section 316(b) rule provide the necessary flexibility for state regulators to implement it based on local conditions?

Response: The agency is still working to develop final standards under section 316(b) for cooling water intake structures. However, I can assure you that, if confirmed, I will work to ensure that the agency has carefully considered the public comments it has received on the proposed standards and on the agency's 2012 Notices of Data Availability, and to ensure that the final standards are consistent with the Clean Water Act and provide appropriate flexibility.

Vitter 13b.. Also, will the Office of Water under your leadership shift direction and focus on the use of science instead of relying on flawed opinion surveys to develop unsupportable benefits positions when conducting economic analysis?

Response: If confirmed, I will ensure that the agency places science as the centerpiece of its work to protect the nation's waters. With respect to the stated preference survey that the agency released in mid-2012, the agency plans to seek review of the study from the EPA's Science Advisory Board, and to not rely upon the survey for any purpose until the SAB review is complete.

Vitter 14. How many human health impacts will be avoided if the proposed Section 316(b) standards are promulgated?

Response: The requirements of Section 316(b) of the Clean Water Act primarily relate to aquatic life. However, if confirmed, I will work to ensure that this and all Agency rules meet the appropriate scientific and legal standards with regard to all types of benefits.

Vitter 15. Can you please explain how utilizing the stated preference survey complies with the Data Quality Act and comports with the best available science?

Response: I am not familiar with the specific protocols that the agency used to develop and undertake its stated preference survey outlined in the agency's 2012 Notice of Data Availability (NODA). However, I believe the agency has done its best to ensure transparency in its efforts by publishing its results in the 2012 NODA, and by seeking future Science Advisory Board review of the survey results to ensure the quality of its approach.

Vitter 16. How does EPA intend to utilize its final stated preference survey report?

Response: I understand that the agency does not intend to utilize the stated preference survey until it is reviewed by the Science Advisory Board. The SAB review has not yet commenced, and the agency does not believe the SAB review will be complete by the agency's deadline for setting final standards pursuant to Section 316(b) of the Clean Water Act. I believe it is premature to speculate on how the agency's survey may be used in the future, but I can assure you that, if confirmed, I will ensure that the survey results are used only as appropriate.

Vitter 17. Will you please provide the charge questions EPA is submitting to the SAB with regard to the stated preference survey for the Section 316(b) rule?

Response: The agency has not yet submitted its charge questions to the SAB for its review of the agency's stated preference survey. However, I commit to you that the agency will ensure that these charge questions are publicly available at the time the SAB's review begins.

Vitter 18. Does EPA intend to create a new subcommittee or use the existing subcommittees?

Response: While I have not been specifically involved in the SAB process for the stated preference survey review, I believe the SAB may establish a new ad hoc expert panel to review the stated preference survey, consistent with the SAB's standard practice for conducting similar reviews.

Vitter 19. What is the purpose of seeking consultation from the Fish and Wildlife Service on 316(b)?

Response: I understand that the EPA is undertaking formal consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service pursuant to Section 7(a)(2) of the Endangered Species Act, and the implementing regulations at 50 C.F.R. § 402.14(c).

Vitter 20. How does EPA intend to use the Biological Evaluation?

Response: Under the consultation process, the EPA prepares a Biological Evaluation which we have provided to FWS. I believe it would be premature for me to speculate on the contents or use of the final outcomes of the endangered species consultation process that is currently underway. However, I commit to you that I will ensure that the final outcomes of this process are implemented consistent with the Clean Water Act and the Endangered Species Act.

Topic: Definition of "Fill Material"

Vitter 21. The current definition of fill material, finalized in May, 2002, unified the Corps and EPA's prior conflicting definitions so as to be consistent with each other and the structure of the CWA. The current rule solidifies decades of regulatory practice, and includes as fill material those materials that, when placed in waters of the U.S., have the effect of raising the bottom elevation or filling the water. However, while both EPA and the Corps have stated that they are now considering revising the definition of fill material, Acting Assistant Administrator for Water Nancy Stoner stated at a May 22, 2013, Subcommittee on Water Resources and Environment hearing that EPA is not actively involved in discussions with the Corps on revising the rule.

Vitter 21a. Will you commit to maintaining the current regulatory definition of fill material?

Response: I appreciate your concern about the importance of the regulatory term "fill material" and the implications regarding potential changes. It is my understanding that the EPA and the Corps are not actively discussing any revisions to the regulatory definition of this term. If confirmed, I would only very cautiously consider any rulemaking on this issue. I look forward to keeping you informed if there is further consideration among the agencies to revise the definition of fill.

Vitter 21b. What is EPA's rationale for potentially revisiting the well-established division of the Section 402 and Section 404 programs?

Response: Thank you for raising this important question. It is my understanding that concern focuses very narrowly on issues raised by recent litigation regarding the relationship between certain activities covered by existing Effluent Limitation Guidelines and regulation of these activities under Clean Water Act section 404. This issue was addressed in the Supreme Court decision in *Kensington* where the court noted remaining ambiguity regarding the 2002 rule regarding circumstances where discharges of fill material (e.g., mine tailings) may also be covered by an Effluent Limitation Guideline. The agencies, however, are not currently discussing the need for such a rule.

Vitter 21c. What specific problems is EPA seeking to address by revisiting the definition of fill material, and how exactly is EPA intending to address them?

Response: It is my understanding that the EPA has made no decision to revise the definition of fill material for any purpose. If confirmed, I look forward to keeping you informed if this decision is revisited.

Vitter 21d. Has EPA yet considered the time and costs associated with making such a change to the two major CWA permitting schemes – Sections 402 and 404?

Response: I appreciate your concern and fully recognize the potential implications of a significant change to the definition of "fill material." I emphasize that the agencies have made no decision to make any change to the existing regulatory term.

Topic: National Stormwater Discharge Rule

Vitter 22. I am happy to hear that EPA has decided to comply with CWA Section 402(p)(6) and will complete a study and submit to Congress a report on the necessity of new stormwater discharge rules under Section 402(p)(5) prior to issuing any new stormwater regulations. Please understand that this requirement is not a paper exercise. Notwithstanding this commitment, I am concerned that EPA fails to understand the purpose of this study and report and EPA's responsibilities and authorities under the CW A.

Vitter 22a. Do you agree that the potential regulation of additional sources of stormwater (other than sources identified in Section 402(p)(2)) is a complex issue of great interest to states, municipalities, small businesses, and other stakeholders?

Response: I understand the importance of the agency's stormwater rulemaking efforts to many stakeholders. If confirmed, I would work closely with stakeholders to ensure that the agency's stormwater rulemaking efforts are as transparent and collaborative as possible.

Vitter 22b. Do you agree that the development of the study and report to Congress under section 402(p)(5) should be an open and transparent process with stakeholder input, including the opportunity to comment on both a draft study and a draft report?
c. Do you agree that the study must be completed before a report is issued?

Response: I agree that the agency's work to update its stormwater regulations under the Clean Water Act should involve close coordination with states and other stakeholders. Although I have not been closely involved in the agency's work in this area, if confirmed, I look forward to making sure the agency complies with the Clean Water Act in its work to protect the quality of our nation's waters from stormwater discharges, and to promote transparency and public involvement in the agency's work.

Vitter 22d. Do you agree that the development of regulations under Section 402(p)(6) must be based on the results of studies under section 402(p)(5)?

Response: I agree.

Vitter 22e. Will you commit to me that you will comply with the CWA and suspend any stormwater rulemaking efforts until a study and report under Section 402(p)(5) are completed? Any rule that is developed without the benefit of the results of the study is ultra vires of EPA's authority under section 402(p)(6).

Response: If confirmed, I can assure you that the agency will fully comply with the Clean Water Act in its development of a report under Section 402(p)(5) and its development of a proposed stormwater rule under Section 402(p)(6).

Vitter 23. Do you agree that the CWA does not regulate the flow of water?

Response: In the Clean Water Act, Congress stated its objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters and provided EPA and the States with an assortment of legal authorities. The decision how the EPA or a State will use these authorities to address a given issue involves very careful consideration of the facts unique to the situation. I commit to work with the EPA's Office of General Counsel and our Regional Offices to ensure that the EPA's use of these authorities is consistent with the words and objectives of the Clean Water Act.

Vitter 24. Do you agree that EPA can require permits under Section 402 only for discharges of pollutants from a point source to a water of the United States?

Response: Section 402 of the Clean Water Act applies to permits for discharges of any pollutant or combination of pollutants. As defined in Section 502 of the Clean Water Act, this includes discharges to "waters of the United States" from point sources, as well as discharges to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.

Vitter 25. Explain the purpose of EPA's new "National Stormwater Calculator," given the fact that this tool estimates the runoff of water, not the discharge of pollutants from a point source.

Response: I understand that the EPA's National Stormwater Calculator, released last week, is a desktop application that estimates the annual amount of rainwater and frequency of runoff from a specific site anywhere in the United States.

Vitter 26. Can you assure the Committee that this Calculator will not be used for any regulatory purpose, given the fact that the CWA does not regulate water?

Vitter 27. Can you assure this Committee that this Calculator will not be used to usurp the authority retained by States under Section 101(g) and will not in any way be used to affect the quantities of water within waters of a State?

Response to Vitter 26-27. I am not familiar with the specific design of the National Stormwater Calculator that the agency released last week. However, if confirmed, I commit to learning more about the Calculator, and will ensure that it and other tools are appropriately used by the EPA staff in their work to achieve the goals of the Clean Water Act and other laws.

Vitter 28. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in *VA Dept. of*

Transportation v. EPA (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

Response: The EPA did not appeal the decision of the District Court for the Eastern District of Virginia in *VA Dept. of Transportation* v. *EPA*. The EPA is continuing to analyze that decision as it works with states to develop options for establishing total maximum daily loads (TMDLs) under the Clean Water Act to address water quality impairments caused by urban stormwater. I commit to working closely with the EPA's Office of General Counsel and our Regional Offices to ensure that such TMDL efforts are consistent with the Clean Water Act.

Vitter 29. Unless EPA has decided to forego rulemaking under Section 402(p)(6), please explain to me why EPA has expended federal resources on the development of a Calculator, which has no regulatory purpose, while continuing to fail to comply with Section 402(p)(5).

Response: While I am not familiar with the specific design of the National Stormwater Calculator or its specific uses, I believe it is intended to serve a nonregulatory purpose by helping property owners, developers, landscapers, and urban planners make informed decisions to protect local waterways from pollution caused by stormwater runoff. Such tools can help the agency and its partners protect our nation's water resources in a collaborative, non-regulatory manner. If confirmed, I commit to learning more about the National Stormwater Calculator and other non-regulatory tools the agency has developed to ensure that they work effectively with other regulatory and nonregulatory efforts underway by the EPA, states, and other partners to protect water quality.

Topic: *Sackett* v. *EPA*:

Vitter 30. In *Sackett* v. *EPA*, the Supreme Court held that the Sackett family in Priest Lake, Idaho could obtain immediate judicial review of a CWA compliance order. I recognize that the Sacketts continue to fight the merits of EPA's compliance order in federal district court, but I would like to better understand the circumstances behind EPA's decision to deny the Sacketts their day in court in the first place.

Vitter 30a. Was it fair for the agency to give the Sacketts the so-called "option" of going through the CWA permitting process or awaiting civil prosecution just so that they could contest EPA's position that their land contained jurisdictional wetlands?

Vitter 30b. Did the EPA apologize to the Sacketts for denying them their day in court for more than four years?

Vitter 30c. If the agency has not or you do not know, can you make sure that EPA does indeed do so? An apology would at least demonstrate that the Agency has some understanding of the toll this case has taken on the Sacketts.

Response to Vitter 30a-c. As I understand the circumstances, the Supreme Court's ruling that compliance orders issued under Section 309 of the Clean Water Act were reviewable in court under the Administrative Procedure Act overturned the position of all five of the Courts of

Appeals that had previously considered this question. As a result, the EPA's previous position in the Sackett case was consistent with this precedent. The EPA is now making sure that recipients of Clean Water Act compliance orders are fully aware of their opportunity to seek pre-enforcement judicial review.

Vitter 31. If a landowner receives or obtains a jurisdictional determination from the EPA which indicates that his or her land is jurisdictional wetlands, may the landowner challenge the determination immediately in court if he or she believes the land is not jurisdictional wetlands?

Response: The U.S. Army Corps of Engineers is the lead agency for making jurisdictional decisions as a part of their permit. I appreciate the basis of this question and I defer to the Corps.

Vitter 32. If you are confirmed, will the Office of Water and EPA continue to prioritize the prosecution of small landowners who unwittingly cause little to no impacts to wetlands and other waterbodies, or will the Office of Water and EPA instead focus on actual and significant environmental threats?

Response: If confirmed I look forward to working with the agency's leadership to fully consider these issues.

Topic: Hydraulic Fracturing

Vitter 33. In 2010, EPA made an announcement on its webpage, without providing a notice and comment period, that requires underground injection control permits for diesel fuel related hydraulic fracturing. Subsequently, EPA proposed a draft guidance document detailing the regulatory program for hydraulic fracturing operations using diesel fuels. At no point has EPA acknowledged the congressional mandate in the Safe Drinking Water Act (SDWA) which states that EPA may not prescribe requirements which interfere with or impede the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations... unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

Vitter 33a. Does EPA intend to abide by the limitations imposed on EPA under the SDWA?

Response: Yes. If confirmed, I look forward to working with agency staff to ensure that the agency's actions regarding hydraulic fracturing are fully consistent with the Safe Drinking Water Act.

Vitter 33b. If yes, what evidence has EPA supplied that new regulations are essential to assure that underground sources of drinking water will not be endangered by such injection?

Vitter 33c. Has EPA undertaken any analysis related to current industry practices and has EPA considered the robust oil and natural gas regulatory programs in place at the state level?

Response to Vitter 33b-c. I do not believe the agency has proposed any new regulations under the Safe Drinking Water Act regarding diesel fuel hydraulic fracturing. Instead, the agency developed draft permitting guidance in 2012 for oil and gas hydraulic fracturing activities using diesel fuels, to help provide information useful in permitting the underground injection of oil- and gas-related hydraulic fracturing using diesel fuels where the EPA is the permitting authority. As the EPA has worked to develop the draft guidance, and as it reviews the more than 97,000 public comments it received on the draft guidance, I believe the agency is carefully considering states' efforts regarding hydraulic fracturing. Moreover, the EPA is interested to work with its state partners to ensure that hydraulic fracturing using diesel fuels is conducted in a way that protects human health and the environment while ensuring that natural gas can play a key role in our nation's clean energy future.

Vitter 33d. What has been your role and the role of the Office of Water with the ongoing EPA study on hydraulic fracturing?

Vitter 33e. When will the study be complete?

Vitter 33f. What is the status of prospective sites being tested for the study?

Response to Vitter 33d-f. The ongoing EPA Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources is being coordinated by the EPA's Office of Research and Development. As such, I have not been directly involved in developing or carrying out the study, and am not familiar with the status of specific case studies being conducted as part of the study. However, I understand that a draft report on the study will be available in 2014.

Topic: National Selenium Water Quality Criterion

Vitter 34. EPA is currently involved in a scientific assessment of selenium that will be used to propose a new national selenium water quality criterion. EPA has stated that it intends to put out its proposed criteria for public comment this coming fall. In response to her own confirmation questions, EPA Administrator Gina McCarthy committed to ensuring that EPA reviews technical comments it receives on any proposed selenium criteria document and makes appropriate revisions to ensure that any final criterion is of high quality.

Under your leadership, what would the Office of Water's strategy be for incorporating relevant scientific critiques and comments received into its final selenium criteria?

Response: I share your interest in ensuring that EPA's decisions regarding selenium are based consistently on the best available science that fairly and effectively takes into account technical critiques. If confirmed, I will work hard to make sure that any future agency decisions regarding selenium adhere to this principle. I understand that if and when the EPA proposes a revised proposed selenium criterion, that criterion would be available for public review and comment, and I commit to ensuring that the EPA reviews the technical comments it receives and makes appropriate revisions to ensure that any final criterion is of high quality.

Vitter 35. Administrator McCarthy further stated that EPA would work with industry to develop a national selenium criterion that satisfies technical standards while retaining appropriate site-specific flexibility.

How will EPA take the site-specific nature of selenium issues into account when developing its national criterion?

Response: I share your interest in ensuring that EPA consistently apply the highest scientific standards in the development of proposed national water quality criteria, including current efforts to revise the existing selenium criterion. If confirmed, I look forward to working with you to develop a national selenium criterion that the public can be confident satisfies these technical standards while retaining appropriate site-specific flexibility.

Topic: Effluent Limitation Guideline for Coalbed Methane Operations

Vitter 36. EPA continues to move forward with an effluent limitation guideline (ELG) for coalbed methane operations. Since the time that EPA began this initiative, the dynamics related to coalbed methane production have changed. EPA's ELG plan assumes natural gas prices in the range of approximately $7 mcf to over $9 mcf. Today the price of natural gas remains near $4 mcf. The low price of natural gas makes coal bed methane less economically competitive, resulting in a decrease in coalbed methane production. Additionally, most of the produced water production associated with coal bed methane operations occurs at the beginning of the production process because the coalseam must be dewatered to allow gas to flow to the surface. Therefore, with few new coalbed methane operations being contemplated, most of the coalbed methane produced water has already occurred.

In light of these dynamics, why is EPA's effort to promulgate a coalbed methane effluent limitation guideline a valuable exercise?

Response: EPA should make sure that its Clean Water Act rulemaking efforts continue to reflect changing economic and environmental circumstances. I understand that the agency announced in its final 2010 Effluent Limitations Guidelines plan that it was initiating two, separate rulemakings to address discharges from coalbed methane and from shale gas extraction. If confirmed, I commit to learning more about the agency's current rulemaking efforts, and to explore opportunities to ensure that the agency's development of effluent limitations guidelines for coalbed methane are based on the best-available science and economics, and are an efficient use of taxpayer dollars.

Topic: Standards for Perchlorate under the Safe Drinking Water Act (SDWA)

Vitter 37. As you are no doubt aware, the EPA Office of Water is in the midst of a rulemaking to set standards for perchlorate under the SDWA. Members of this Committee have had questions as to whether the risks presented by perchlorate justify the extensive resources that EPA has invested to date in this controversial rulemaking. Most recently, the SAB questioned EPA's entire approach for setting this standard and recommended that the Agency use a different methodology.

Vitter 37a. If you are confirmed, will you assure us that you will undertake a thorough and independent assessment of this rulemaking and determine whether regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources?

Response: If confirmed, I commit to learning more about the status of the agency's work to develop a drinking water standard for perchlorate, including the advice recently provided to the agency by the Science Advisory Board, and will work with Administrator McCarthy to ensure that the agency develops an appropriate and protective drinking water standard for perchlorate.

Vitter 37b. If you determine that regulating perchlorate under the SDWA is a rational and reasonable use of the Agency's limited resources will you provide an explanation of other EPA priorities that will need to be delayed or abandoned in order to finalize the perchlorate MCL?

Response: I understand that former EPA Administrator Jackson determined in February 2011 that regulating perchlorate under the Safe Drinking Water Act (SDWA) was appropriate, based on the statutory factors outlined in SDWA, and that the agency is currently working to develop a drinking water standard for perchlorate. While I do not believe that continued work on perchlorate would displace any current activities in the Office of Water, if confirmed, I am interested to learn more about the agency's efforts and to ensure that its work on perchlorate does not impede other priorities of the Office of Water.

Topic: *Iowa League of Cities v. EPA*

Vitter 38. In *Iowa League of Cities v. EPA,* the Eighth Circuit determined that two letters from EPA to Senator Grassley regarding wastewater treatment processes were the equivalent of regulations. Both were vacated as procedurally invalid. However, it has come to my attention that EPA believes that *Iowa League of Cities* was wrongly decided and may attempt to limit this decision to the Eighth Circuit. EPA must recognize the need for transparency and predictability in the regulatory system and go through the proper administrative channels to clarify or develop new rules with respect to wastewater treatment and other activities.

Accordingly, will you commit to applying the *Iowa League of Cities* decision nationally?

Response: If confirmed, I look forward to working with the agency's leadership to fully consider these issues. The Eighth Circuit denied the EPA's petition for en banc rehearing of the decision; however, the matter is still in litigation. Once the litigation is resolved, I hope to carefully consider the next steps for addressing these issues.

Topic: *NMA v. Jackson*

Vitter 39. The U.S. District Court for the District of Columbia in the case of *NMA v. Jackson* (now *NMA v. Perciasepe* on appeal) recently struck down several EPA actions-

specifically, EPA's Enhanced Coordination Process (ECP) and Multi-Criteria Integrated Resource Assessment (MCIR) for Appalachia surface coal mining, as well as EPA's guidance document, "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the CWA, National Environmental Policy Act, and the Environmental Justice Executive Order"- as violating the CWA and Administrative Procedure Act (APA), as well as, in the case of the guidance document, the Surface Mining Control and Reclamation Act. Administrator McCarthy stated that EPA has directed its field offices not to use the guidance documents impacted by the court decision and instead to rely on regulations promulgated under the APA.

What future actions does EPA intend to take to ensure that the court's decision is fully implemented?

Response: I appreciate your interest in this important matter. Although the agency's appeal of the District Court's decision is pending, I understand that the agency has directed its field offices not to use the guidance documents affected by the court decision. If confirmed, I will continue to follow this approach as the EPA waits for a final decision of the court in this matter.

Senator Inhofe

Inhofe 1. According to the Office of Information and Regulatory Affairs' (OIRA) website controversial EPA draft guidance called "Clean Water Protection Guidance" has been undergoing White House review since February 2012. One of the more controversial concepts contained in the EPA draft is how EPA could assert federal jurisdiction over any isolated wetland "if the Agency found a "significant nexus" between the isolated wetland and a traditional navigable water (TNW) or interstate waters (IW) based upon a so called biological or ecological connection. This biological or ecological connection between an isolated wetland and a TNW or IW can form the basis of EPA's "significant nexus" test as to why an otherwise isolated wetlands or even categories of land features known as "other waters" (i.e., intermittent stream, wet meadow, playa lake, prairie potholes, etc.), could be found by EPA/Corps to be jurisdictional under the CWA.

In 2011, the U.S. Fish & Wildlife Service (Service) entered into a voluntary legal settlement with just two environmental groups. Under terms of that legal settlement, the Service is scheduled to make hundreds of species listing determinations and designation of critical habitat under Endangered Species Act (ESA) over the next three years including hundreds of aquatic species (fish, mussels, and amphibians). Private landowners, whose property has been designated as critical habitat for an endangered or threatened species under ESA, face the risk of having their property subject to the ESA's regulatory and permitting requirements. However, under EPA's draft "Clean Water Protection Guidance" these same landowners also face having otherwise non-jurisdictional isolated wetlands becoming jurisdictional wetlands because of this presumed biological or ecological connection.

Under the pending draft Clean Water Act guidance how might the designation of critical habitat by the Service under the ESA; impact how EPA applies the "significant nexus" when evaluating whether an otherwise isolated wetland would become a jurisdictional wetland under the Clean Water Act (CWA)?

Response: Potential Clean Water Act jurisdiction over "other waters" is a very important issue and, if confirmed, one that I will pay close attention to, recognizing its implications for farmers and other land owners. As I understand the draft guidance, it is intended to clarify and explain the statutory requirements and it would not change the existing statutory and regulatory basis for the case by case evaluation now required to determine whether or not a significant nexus is present. As a result, I do not anticipate that the guidance, if issued, would result in a significant change, if any, to current practices regarding "other waters."

Inhofe 2. EPA is developing a national stormwater rulemaking for new and redeveloped sites that will require retention of stormwater, and expand the storm water programs for MS4's and States. MS4's have programs to manage stormwater from new and redeveloped sites, yet EPA's new regulation will continue to target States and thousands of local governments that do not have the resources to appropriately implement and enforce the existing construction stormwater program, much less a substantially expanded program contemplated by the national stormwater rulemaking.

In developing this new regulation, how does EPA plan to minimize the burden on property owners, developers, state and local government that are already struggling to meet the existing regulatory requirements?

Response: The agency should do all it can to minimize the burden on property owners, developers, states, and local governments as the agency works to protect water quality from the effects of stormwater discharges. While the agency has not developed a proposed stormwater regulation, the agency is considering opportunities to provide flexibility for cities and counties that have protective stormwater programs. If confirmed, I look forward to learning more about the agency's work to develop a stormwater rule, and will seek opportunities to minimize burden while ensuring adequate protection for public health and the environment.

Inhofe 3. EPA is seeking to justify its costly proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be willing to pay to reduce harm to fish at cooling water intakes. This willingness-to-pay approach to determining "benefits" contrasts sharply with the far more traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. The "willingness-to-pay" or "stated preference" survey is clearly intended to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. Using such unreliable benefit estimates will inappropriately lead to extremely expensive cooling water controls that would cause additional plants to shutter. Recall that in October 2010 NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Taxis Standards. See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010).

Given all these problems, would you support withdrawing the survey and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

Response: The studies on which the EPA relies should be of high quality and should be used only in appropriate circumstances. With respect to the agency's stated preference survey regarding 316(b), I understand that the agency does not intend to utilize the stated preference survey until it is reviewed by the Science Advisory Board. The SAB review has not yet commenced, and the agency does not believe the SAB review will be complete before the EPA publishes final standards pursuant to Section 316(b) of the Clean Water Act. I believe it is premature to speculate on how the agency's survey may be used in the future, but I can assure you that, if confirmed, I will ensure that the survey results are used only as appropriate.

Inhofe 4. In EPA's proposed 316(b) rule EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For entrainment, EPA appropriately adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each

site. Yet for impingement, EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement.

In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

Response: It is my understanding that the EPA explicitly discussed possible changes to the proposed 316(b) rule's impingement standard in the NODA published in the Federal Register on June 11, 2012, and that the EPA is carefully reviewing those comments as it develops the final rule. If confirmed, I would be willing to look closely at flexibilities for compliance with the impingement standard.

Senator Barrasso

Barrasso 1. Is there anything you disagree with regarding the proposed Clean Water Act jurisdictional guidance?

Response: I understand your interest in the important issues associated with the preparation and issuance of guidance regarding the scope of Clean Water Act jurisdiction. The EPA and the U.S. Army Corps of Engineers are now implementing jurisdiction guidance issued during the previous administration in 2008. The agencies' goal is to improve upon that guidance and to reduce existing costs and delays associated with identifying waters of the U.S. Since coming to the agency, I supported additional improvements to the guidance that will help to enhance predictability and improve consistency with the Supreme Court decision in *Rapanos*.

Barrasso. If confirmed, will you continue EPA's practice of using guidance to make major policy decisions regarding the Clean Water Act, or other federal laws under your jurisdiction, as opposed to going to Congress to seek changes?

Response: If confirmed, I will work to ensure that any changes to the EPA regulations are promulgated consistent with the requirements of the Administrative Procedures Act. I share your interest in using guidance not to establish new law, but only to clarify existing requirements established by the Congress or through APA rulemaking. Having worked on the hill for so many years, I understand the legislative responsibilities reserved expressly for the Congress under the Constitution and will continue to respect that role if confirmed into my new position in the Executive Branch.

Barrasso 3. What is your understanding of the role Congress plays versus the EPA in terms of who makes the laws?

Response: I have spent nearly my entire career working in either the Senate or the House of Representatives of the U.S. Congress. I have great respect for the role of the Congress under the Constitution to enact the nation's laws and will continue to respect that role if confirmed into my new position in the Executive Branch. The critical role of the EPA, like other executive branch agencies, is to carry out the law as enacted by the Congress, including writing regulations to implement the law. I look forward to working with you, if confirmed, as the EPA implements the law as enacted by the Congress.

Barrasso 4. Do you think Congress originally wanted EPA to regulate ephemeral streams that only have water in them during rain fall events?

Response: The scope of Clean Water Act jurisdiction has been widely debated and litigated since enactment of the statute in 1972. The courts have generally supported a broad interpretation of the geographic scope of the Act. Supreme Court decisions in *Rapanos* and *SWANCC* have created uncertainty regarding the scope of the Clean Water Act. Since these decisions, the agencies' interpretation of the law has been widely upheld, which includes jurisdiction, in some circumstances, over tributaries with ephemeral flow. If confirmed, I will

work to ensure that the reach of the Clean Water Act is consistent with the law, including the Supreme Court decisions in *SWANCC* and *Rapanos*.

Barrasso 5. Do you believe Congress provided limits to federal authority in the Clean Water Act? Please explain in detail what those limits are.

Response: I believe the Congress did intend limits to federal authority under the Clean Water Act. I recognize that the Congress enacted the Clean Water Act to provide the EPA with the authority to protect public health and the environment. I understand the limitations inherent in that authority and the EPA's focus on restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, which expressly excludes superseding the role of states, for example, in allocating water quantity.

Barrasso 6. The EPA and the Corps affirm that the Clean Water Act Jurisdictional Guidance will result in an increase in jurisdictional determinations which will result in an increased need for permits. How many more EPA personnel and taxpayer funds will be needed to implement this guidance if it goes forward?

Response: It is the agencies' goal in developing new jurisdictional guidance to reduce existing delays, uncertainty and associated costs for permit applicants and the government by simplifying and clarifying the procedures for conducting jurisdictional determinations. If confirmed, I look forward to coordinating with you as we work to achieve this important goal.

Barrasso 7. Do you believe that additional regulatory costs associated with changes in jurisdiction and increases in permits will erect bureaucratic barriers to economic growth, negatively impacting farms, small businesses, commercial development, road construction and energy production?

Response: The EPA's economic analyses find that the guidance will result in a net economic gain, including as a result of reduced costs associated with conducting jurisdictional determinations and maintaining protection for the nation's sources of clean water. The EPA also discussed with the Small Business Administration the potential impacts of the guidance on the nation's small business community. If confirmed, I will work with my federal and state partners to limit any negative economic effects of the guidance and promote effects that reduce existing costs and delays and improve national consistency and predictability.

Barrasso 8. Do you believe that expanding federal control over intrastate waters will substantially interfere with the ability of individual landowners to use their property? If not, why not?

Response: No. It is my understanding, based on an analysis of the draft guidance conducted by the U.S. Army Corps of Engineers, that the guidance would not significantly change the current geographic scope of Clean Water Act jurisdiction, and will not restore it to its scope prior to the Supreme Court decisions in *SWANCC* and *Rapanos*. If confirmed, I look forward to working with you to ensure that the voices of individual landowners are heard and respected.

Barrasso 9. Since the Supreme Court's decision in Sackett v. EPA, the EPA has recognized that recipients of Clean Water Act compliance orders are entitled to immediate judicial review of the orders. If you are confirmed, will you ensure that EPA also recognizes that recipients of Clean Water Act jurisdictional determinations are also entitled to immediate judicial review?

Response: I understand the importance of this question as the agencies work to apply the decision in *Sackett* v. *EPA*. As a general matter, however, the EPA does not conduct jurisdictional determinations for landowners seeking Clean Water Act permits. Under Clean Water Act section 404, jurisdictional determinations are performed by the U.S. Army Corps of Engineers. If confirmed, I would be glad to work with you and the Corps of Engineers to address this key issue.

Senator Sessions

Sessions 1. I am informed that EPA is seeking to justify its proposed 316(b) rule, which would affect more than 1,260 power plants and industrial facilities nationwide, on the basis of a mail-in public opinion survey asking "how much" a random group of individuals would be "willing to pay" to reduce harm to fish at cooling water intakes. It is my understanding that this "willingness-to-pay" approach to determining "benefits" contrasts sharply with EPA's traditional approach used by EPA in its earlier 316(b) rulemakings and other rulemakings. The earlier analyses relied on actual market prices and costs incurred by individuals, rather than hypothetical questions in a public survey. It seems that this "willingness-to-pay" or "stated preference" survey is intended by EPA to increase the anticipated benefits of the proposed rule and justify costly controls, such as cooling towers. I am concerned that using unreliable benefit estimates could add unwarranted costs on power plants that could cause additional plants to shut down. I am informed that, in October 2010, NERC issued a report concluding that 316(b) could have economic impacts nearly three times greater than the combination of the Cross State Air Pollution Rule and the Mercury and Air Toxics Standards. See NERC, 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations (October 2010). Given these concerns, would you support withdrawing the "willingness-to-pay survey" and clarifying that the survey and its results are inappropriate to use in justifying the final rule or requirements at individual facilities?

Response: The NERC's hypothetical analysis assumed that states will choose to mandate that all affected plants install cooling towers, even if this leads to plant retirements causing reliability problems. The EPA did not propose a "one-size fits all" approach for entrainment for its 316(b) rule; instead, the EPA proposed a site-specific approach to entrainment. My understanding is that the EPA did not propose a uniform closed-cycle cooling requirement based on consideration of possible local energy reliability concerns, air quality issues, geographical constraints on the installation of closed-cycle cooling and facilities with a limited remaining useful plant life.

Sessions 2. I am informed that, in EPA's proposed 316(b) rule, EPA has adopted starkly different approaches to managing "impingement" and "entrainment" at existing cooling water intake structures. For entrainment, it is my understanding that EPA adopted a site-specific approach, recognizing that (a) existing facilities already have measures in place to protect fish, (b) further measures may or may not be needed, and (c) the costs, benefits, and feasibility of such measures have to be evaluated at each site. This seems appropriate. Yet for impingement, I am told that EPA adopted rigid, nationwide numeric criteria that appear unworkable and in many cases unnecessary. In a notice of data availability issued last year, EPA signaled that it would consider a more flexible approach for impingement. In the final rule that is due this fall, would you support replacing the original impingement proposal with a more flexible approach that pre-approves multiple technology options and allows facility owners to propose alternatives to those options if the costs of additional measures would outweigh benefits?

Response: It is my understanding that the EPA explicitly discussed possible changes to the proposed 316(b) rule's impingement standard in the NODA published in the Federal Register on June 11, 2012 and that the EPA is carefully reviewing those comments as it develops the

final rule. If confirmed, I would be willing to look closely at flexibilities for compliance with the impingement standard.

Sessions 3. During Administrator McCarthy's confirmation process, I expressed concerns about EPA's continuation of efforts to establish effluent limitation guidelines (ELG) for coalbed methane (CBM) production. In her responses to my QFRs, she wrote: "I understand the importance of your questions to natural gas producers in Alabama and elsewhere. I have not been directly involved in this CWA issue, but if confirmed, I look forward to working with you as EPA looks at this important issue under the CWA." Do you, also, commit to work with me and my staff on this issue and to keep us closely apprised of all EPA actions on this matter?

Response: If confirmed, I commit to working with you to keep you and other members of the committee informed of these efforts.

Sessions 4. As outlined in my letter to the EPA dated May 10, 2012, the ELG process, which started in 2008, cannot be justified in light of prevailing economic conditions and the price of natural gas in today's market. Natural gas prices are much lower now than in 2008 when EPA started this process. Moreover, I am advised that there is no need for these ELGs because Alabama has successfully managed the National Pollutant Discharge Elimination System (NPDES) for more than 25 years with EPA regional supervision, and that an ELG is even less necessary now because of decreased gas and water production. A CBM ELG would threaten production across the country and could even end production in Alabama, thereby harming the great progress this country has made toward energy independence and progress in domestic natural gas production. I appreciate EPA's response dated June 12, 2012, that acknowledges the ELG must be economically achievable. The EPA has been working on a proposed rule regarding effluent limitation guidelines (ELG) for CBM since 2008. During that time, natural gas prices have decreased significantly. I am told that this dynamic renders a CBM ELG economically unachievable. Rather than devoting additional time and resources to an effort that the EPA cannot justify- economically or on the merits- I encourage you to abandon any efforts to establish a CBM ELG. Please provide an update on this process. Does EPA intend to continue this ELG process even though EPA acknowledges that it cannot issue new guidelines if they are economically unachievable? What are the costs to EPA of the entire ELG process for coalbed methane? I am told that EPA has actively been working on the CBM ELG since 2007 including an extensive survey of companies and that, to date, no economic information has been provided to the public even though the Clean Water Act requires an economic feasibility test. When can stakeholders expect to see such an analysis?

Response: The EPA should make sure that its Clean Water Act rulemaking efforts continue to reflect changing economic and environmental circumstances. I understand that the agency announced in its final 2010 Effluent Limitations Guidelines plan that it was initiating two, separate rulemakings to address discharges from coalbed methane and from shale gas extraction. If confirmed, I commit to learning more about the agency's current rulemaking efforts, including the cost of such efforts, and to explore opportunities to ensure that the agency's development of effluent limitations guidelines for coalbed methane are based on the best-available science and economics, and are an efficient use of taxpayer dollars. Moreover, I commit to ensuring that any proposed standards published by the agency comply with the Clean

Water Act as to technological and economic feasibility, and that the information on which the agency relies is made publicly available.

Senator Wicker

Wicker 1. What do you think the geographic scope for the award of RESTORE Act funds should be and why?

Response: I believe that the RESTORE Act provides clear priorities for selecting projects and programs for inclusion in the Comprehensive Plan published by the Restoration Council, which are to protect and restore the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches and coastal wetlands of the Gulf Coast Region. The federal members of the RESTORE Council are currently developing a unified position on the appropriate geographic scope of the RESTORE Act, consistent with the direction provided by Congress. If confirmed, I look forward to working together with all members of the Council, consistent with the RESTORE Act, to determine which projects and programs are ultimately selected through the Comprehensive Plan for funding and implementation

Wicker 2. How much control do you think the States should have over the selection of projects for the 35% of Gulf Coast Restoration Trust Fund contents that are to be divided among the Gulf States?

Response: I believe the RESTORE Act provides significant flexibility for states to select projects from a broad range of eligible project categories funded by the 35% of RESTORE Act funds that are divided equally among the Gulf states under the Direct Component.

Senator Boozman

Boozman 1. As you know, the EPA has inappropriately released personal and confidential business information relating to concentrated animal feeding operations (CAFOs) to certain activist organizations. (Amanda Peterka, EPA probes release of CAFO data to enviro groups, Mar. 6, 2013, http://www.eenews.net/Greenwire/2013103106/archive/2?term=EPA+probes+release+of+CAFO+data+to+enviro+groups). Earlier this year, I asked the EPA whether Arkansans were directly impacted by the Agency's careless disregard for legitimate privacy concerns during this incident. The Agency responded that "Arkansas is one of the 19 states for which the data was either: (1) available to the public on websites, (2) is subject to mandatory disclosure under state or federal law, or (3) does not contain data that implicated a privacy interest; the data from these nineteen states is therefore not subject to withholding under the privacy protections of FOIA Exemption 6." This implies that Arkansans were directly impacted, but it leads to further questions and concerns. The EPA seems to claim that there was no legal obligation to keep the Arkansas-related information confidential. Even so, the release of this information to activist groups inappropriately paints a target on Arkansans. As you know, the Department of Homeland Security had previously informed the EPA that the release of such information could constitute a domestic security risk. Would you please explain your views on (1) whether it was appropriate for the Agency to release the personal and confidential business information of Arkansans to activist organizations, (2) whether the agency could have met its FOIA obligations in this case without directly releasing Arkansas-related information to activist organizations?

Response: The agency should treat with utmost seriousness the task of protecting the privacy of Americans recognized by the Freedom of Information Act, the Privacy Act, and the EPA's Privacy Policy. I am not familiar with the specifics of the Arkansas data that were released pursuant to the Freedom of Information Act earlier this year. However, I commit to you that, if confirmed, I will work hard with the agricultural community to rebuild trust between the EPA and America's farmers. Moreover, I will work hard to ensure that the EPA appropriately protects the information provided to it by states regarding our nation's farmers.

Boozman 2. For many years, Congress has required EPA to support partnerships with non-federal entities, like the Water Systems Council, that help sustain safe drinking water sources for rural Americans who rely on groundwater. Please describe your views regarding the EPA's role in providing support for improved water quality and water systems to rural communities. Specifically, please address the EPA's role in supporting programs that provide training and technical assistance to citizens and communities that rely on individual water wells and small water well systems.

Response: If confirmed, I would strongly support the EPA utilizing the various tools provided under the Safe Drinking Water Act (SDWA) to enable EPA and our state partners to better target our resources and technical assistance toward improving small system sustainability. I believe that the EPA should strive to improve the protection of human health and make America's small water systems sustainable through financing public water system infrastructure; working with states to strengthen the SDWA Capacity Development Program to

improve system sustainability; and targeting technical assistance to promote water system partnerships.

If confirmed, I would also support the EPA's continued work with the U.S. Department of Agriculture (USDA)'s Rural Development – Rural Utilities Service to support increasing the sustainability of drinking water systems nationwide to ensure the protection of public health and water quality. I would also support continued grant funding to provide training and technical assistance to urban and rural drinking and wastewater systems and private well owners. Ensuring that the EPA does all it can to provide safe drinking water to rural communities would be a priority if I am confirmed as Assistant Administrator for Water.

Boozman 3. I'm sure you're familiar with OMB circulars that are provided to instruct agencies on the proper way to carry out regulatory analysis. For example, OMB Circular A-4 states that "a real discount rate of 7 percent should be used as a base-case for regulatory analysis." This circular also states that "analysis of economically significant proposed and final regulations from the domestic perspective is required, while analysis from the international perspective is optional." Do you believe it is important for agencies to follow OMB instructions to ensure that regulatory analysis is conducted in a consistent manner?

Response: I believe it is important for agencies to follow the OMB guidance to ensure that regulatory analysis is conducted in a consistent manner. If confirmed, I look forward to working to ensure that the analyses the agency conducts for water related rulemakings are consistent with this OMB guidance.

Boozman 4. In assessing the benefits and costs of a regulatory policy, do you believe that EPA should evaluate domestic costs and domestic benefits separately from global/international costs and benefits? In other words, do you think standard practice should be to separate out the benefits to and costs to American citizens of a particular regulatory policy, so that those costs and benefits can be independently evaluated?

Response: An effective regulatory analysis is designed to inform the public and other parts of the government about the expected impacts of a regulatory action. For the vast majority of benefits from Clean Water Act rules, I believe that the EPA's analysis would focus on the benefits that accrue from cleaner water within the U.S.

Boozman 5. This Committee has heard testimony this year- from both scientists and policy-makers- that narrative nutrient criteria, properly structured, can effectively protect water quality to meet designated uses. If confirmed, would you seek to use EPA power or resources to impose numeric nutrient criteria on states? Of, if confirmed, would you support EPA cooperation with states that would prefer to maintain narrative nutrient criteria?

Response: If confirmed, I would actively support the EPA's ongoing cooperation with states to ensure that they effectively address the challenges posed by nutrient pollution. Both numeric and narrative nutrient criteria can be critical tools for helping states to address nutrient pollution, and I believe that we are most effective where the EPA and states work together to address nutrient pollution challenges.

Boozman 6. As you know, EPA Region 6 is working on the Illinois River Watershed Modeling Project with a possible TMDL process to follow in Arkansas and Oklahoma. Earlier this year, the States of Arkansas and Oklahoma signed a Second Statement of Joint Principles and Actions. This bi-state agreement provides a three-year extension of existing commitments-which have led to significant decreases in flow-adjusted monthly phosphorous loads over time-while the states jointly perform a stressor-response study, funded by the State of Arkansas and managed by a committee appointed, in equal numbers, by each state. The States of Arkansas and Oklahoma agree to be bound by the findings of the Joint Study. Specifically, Arkansas agrees to fully comply with the standard at the state line, whether the existing standard is confirmed or a new standard is established. Given this bi-state agreement, Senator Pryor, Congressman Womack, and I have urged the EPA to continue working on the model but to also postpone TMDL development until after the joint statement obligations are completed. Do you have any thoughts on this approach? And will you agree to work closely with our state officials on these types of issues?

Response: Although I am not familiar with the specifics of this effort, I am encouraged by the agreement between the States of Arkansas and Oklahoma on this issue. I understand that the EPA continues to work with Oklahoma and Arkansas; affected tribes; and other interested parties to develop a comprehensive water quality model of the watershed. If confirmed, I look forward to learning more about these ongoing efforts, and agree to work closely with my colleagues in the EPA Region 6 office and with state officials on this and other issues of mutual interest.

Boozman 7. Some activists seek to use Office of Water programs to address climate change by, for example, urging that resources be set aside for "green" water projects that reduce emissions. Do you believe that reduced emissions should be a higher priority for the Office of Water than clean water? Specifically, if forced to choose, would you rather spend limited resources on more-expensive projects that result in fewer emissions but also reduce water quality improvement capacity, or would you rather stretch tax dollars further to maximize the quantity and effectiveness of water quality protection infrastructure?

Response: Ensuring clean water is the primary mission of the Office of Water and the laws that it implements. However, where there are opportunities to achieve clean water benefits as well as other environmental, public health and community benefits, the agency should pursue an approach that achieves both. Such an approach can help create efficiencies and help ensure greater benefits for each dollar spent on our nation's infrastructure.

Boozman 8. Too often the EPA takes actions that lead to distrust in rural farming communities. While most farmers want to be good stewards of land and water, they often distrust government programs, even voluntary programs, and rightfully so. EPA can make choices that seriously impact rural participation in voluntary conservation and environmental protection efforts. For example, hypothetically speaking, in helping to set-up voluntary nutrient trading programs, EPA could choose to support non-point source reduction verification through USDA-led (or state agricultural agency-led) verification of the implementation of best management practices by non-point sources that choose to participate. Or, EPA could choose to push for site-specific,

"on-field" water quality monitoring. What are your thoughts on these issues, and what steps would you take to earn trust in rural and agricultural communities?

Response: The EPA's work to ensure clean water is best pursued in close collaboration with states, other federal agencies, and stakeholders, and I share Administrator McCarthy's commitment to strengthening the EPA's relationship with rural America as EPA works to protect human health and the environment. With respect to nutrient trading, I understand the potential concerns that our nation's farmers may have about their participation in water quality programs, but believe that the EPA can do more, in coordination with the USDA and other agencies, to encourage their voluntary participation. The USDA has strong, on the ground relationships with our nation's farmers, and if confirmed, I would work to identify how the EPA's work under the Clean Water Act and Safe Drinking Water Act can leverage these relationships to the maximum possible extent to improve communication, trust, and on the ground results.

Boozman 9. Will you initiate any interagency communications or coordination with USDA and other federal and state entities to ensure that the costs and burdens on American farmers and rural communities are fully considered by the EPA? If so, please describe any permanent protocols or practices that you would put in place to ensure that such communication and coordination continues throughout your tenure.

Response: I share your interest in assuring that the EPA carefully considers potential impacts on our nation's farmers and rural communities as it works to provide clean water. If confirmed, one of my first priorities would be to further strengthen the agency's relationship with the USDA to ensure that the interests of our nation's farmers and ranchers are incorporated into the agency's decision-making process. I believe my first step in this effort, if confirmed, would be to become more familiar with the ways in which the EPA and the USDA currently collaborate, and to identify specific ways in which the agency could strengthen and formalize those partnerships. If confirmed, I would be pleased to provide you an update on this work, including specific opportunities that I identify for closer collaboration in the area of assessing potential impacts to America's farmers.

Boozman 10. If confirmed, you will receive periodic oversight letters from the Environment and Public Works Committee. As the Ranking Member of the Water and Wildlife Subcommittee, I suspect that I will send you letters seeking information that is critical to the formulation of public policy. This oversight is critical as we seek to evaluate the effectiveness of government programs and policies, as we work to identify and eliminate wasteful government practices, and as we labor to eliminate fraud, corruption, abuse, and other forms of misconduct. Please describe your views regarding the importance of timely responses to legislative branch inquiries. If confirmed, what will you do to ensure that you and your office respond in a thorough and timely manner to legislative branch inquiries? Please be specific.

Response: If confirmed, I look forward to working closely with you and your colleagues on the Environment and Public Works Committee, and others in the Congress, to effectively implement our nation's clean water laws. My significant experience on Capitol Hill has demonstrated to me the importance of developing a constructive working

relationship between the executive and legislative branches. If confirmed, I will work closely with my colleagues at the EPA to ensure that inquiries from you or others in the Congress are addressed in a timely and comprehensive manner.

Senator Fischer

Prior Converted Cropland

In response to one of my questions at your confirmation hearing, you stated, if a farmer changed the use of his or her prior converted cropland (PCC) from an agricultural to a non-agricultural use, the new use would need to fall under one of the Clean Water Act (CWA) 404(f) agricultural exemptions to avoid the need for a CWA permit. Ibelieve your response is not consistent with EPA and Corps regulations or with judicial precedent.

In 2010 and 2011, the U.S. District Court for the Southern District of Florida vacated a nationally-applicable guidance issued by the Corps's Headquarters claiming that once PCC is converted from an agricultural use to a non-agricultural use, it ceases to be excluded from the CWA. In vacating the guidance, the court deemed the guidance to be in direct conflict with the EPA's and Corps's 1993 rule excluding PCC from the CWA because the rule's preamble provided that PCC remains PCC (and thus excluded from CWA requirements) regardless of use. In fact, the position explained by the joint EPA/Corps preamble was in response to a direct comment from the public asking whether a change in use results in the loss of PCC classification. The court concluded the guidance was a nationally applicable legislative rule promulgated without following the Administrative Procedure Act (APA). Unhappy with the court's ruling, the Corps sought to amend the judgment in 2011 in order to apply the guidance on a case-by-case basis. The court, again, instructed the Corps that it was not to make any wetlands determinations inconsistent with its prior order unless it changes the 1993 rule following APA notice and comment rulemaking procedures. The Corps did not appeal the decision. Both the 2010 and 2011 court orders are attached for your review.

Fischer 1. Is EPA adhering to the district court ruling that enjoins the Corps from applying the "change in use" guidance nationwide? If not, please explain why?

Response: I appreciate your question on this important issue. The preamble to the 1993 PCC rule clarifies the circumstances under which agricultural lands could lose their status as PCC consistent with then existing provisions of the Food Security Act (FSA). The FSA rules subsequently changed and I know the U.S. Army Corps of Engineers (Corps) has been working with the U.S. Department of Agriculture (USDA) to reflect those changes in how it implements the agencies' Clean Water Act regulations. The EPA generally does not make jurisdictional determinations, but instead relies on the Corps in its role as the Clean Water Act section 404 permitting authority. The EPA's goal, however, which I know is shared by the Corps and the USDA, is to provide farmers with consistency and predictability in the implementation of agency responsibilities. If confirmed, I look forward to working with our federal partners and the agriculture community to ensure maximum consistency in the application of the PCC rule.

Fischer 2. If EPA is not adhering to the district court ruling, please explain to me what EPA's position is regarding the regulatory status of PCC that is converted to a non-agricultural use? Is EPA's position the same as the position you took at your confirmation hearing? Is it EPA's position that upon changing the use of prior converted cropland from an agricultural

to a non-agricultural use, that land no longer qualifies as prior converted cropland and can be considered a "water of the United States" absent another exemption?

Response: I want to emphasize that, as a general matter, the EPA does not conduct Clean Water Act jurisdictional determinations, including determinations regarding the jurisdictional status of Prior Converted Cropland (PCC). The Corps has this responsibility as a part of its day to day role as the Clean Water Act section 404 permitting authority. The EPA is working with the Corps and the USDA, however, to ensure maximum consistency in the implementation of requirements established under the Clean Water Act and Food Security Act. The agencies promulgated the PCC rule in 1993 to ensure that farmers could rely on determinations made by the USDA regarding the status of their property. If confirmed, I will work with the USDA and the Corps to clarify this issue consistent with the Florida court decision.

Fischer 3. Will you commit to me that, if confirmed, EPA will not take a position that is different from the district court ruling discussed above unless and until EPA and the Corps change the 1993 rule following notice and comment rulemaking?

Response: If confirmed, I will work with the Corps and the USDA to clarify implementation of the PCC regulation in a manner consistent with the District court decision in Florida and under the requirements of the Administrative Procedures Act. The EPA's goal will be to provide farmers with a consistent and predictable determination regarding the status of their lands under the Food Security Act and the Clean Water Act.

Fischer 4. If you will not make such a commitment, please explain to me what authority EPA has to deviate from the position adopted in the 1993 rule.

Response: If confirmed, I look forward to working with our federal partners to clarify implementation of the 1993 Clean Water Act rule in a manner that is consistent with existing provisions of the Food Security Act so that farmers may continue to rely on a single federal voice.

Fischer 5. Does EPA have any plans to adopt further guidance or go through a rulemaking to change the 1993 rule in order to impose a "change in use" limitation on the PCC exemption?

Response: It is my understanding that no decision has been made by the EPA to adopt guidance or revise our regulations to impose a "change in use" limitation. If confirmed, I look forward to keeping you informed about progress on this issue.

Fischer 6. Do agricultural ditches on cropland that is PCC also qualify PCC?

Response: The status of agricultural ditches as "Prior Converted Cropland" is a determination made by the USDA. I defer to USDA to clarify the status of ditches located on PCC.

<u>EPA's National Rivers and Streams Assessment</u>

Thank you for committing to me that, if confirmed, you will ask EPA staff to relook at the way to set the benchmark when conducting the National Rivers and Streams Assessment. You also indicated that the assessment is intended to address the question of "how well are we doing." To understand the approach you will take on this issue if confirmed as the Assistant Administrator, please respond to the following questions:

Fischer 7. I believe the mission of EPA's Office of Water is to implement statutes enacted by Congress, including the Clean Water Act. Do you believe the Office of Water has other missions not authorized by statute?

Response: No. I believe it is the responsibility of the Office of Water to implement the laws passed by Congress, and if confirmed, would ensure that the EPA continues to do so.

Fischer 8. In your view, is it appropriate for EPA's Office of Water to measure "how well we are doing" implementing the Clean Water Act by evaluating the condition of waters against a benchmark of streams that are least disturbed by human activity?

As I stated at my confirmation hearing, I am not intimately familiar with the process used in the National Rivers and Streams Assessment to set a benchmark against which to compare monitoring results. I understand that the primary purpose of the National Rivers and Streams Assessment is to provide general information about the quality of our nation's waters, and not to serve a specific Clean Water Act regulatory purpose. If confirmed, I look forward to learning more about the approach used in the draft assessment to ensure that it represents the highest quality science and is effective at helping to assess the conditions of our nation's waters.

Fischer 9. Do you consider it to be the mission of EPA's Office of Water to return rivers and streams to conditions that existed before human activity?

The EPA's overall mission under the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, as noted in Question 10 below. The agency works to achieve this Congressional statement of policy through the specific programs outlined in the Act.

Fischer 10. The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Do you believe the Clean Water Act objectives under section 101(a) are a grant of authority to EPA to take actions to further those objectives, or do you believe EPA can implement the Clean Water Act only through specific authorities granted in other sections of the Act?

Response: It is important for all of the EPA's actions to be consistent with the authorities conferred by the Clean Water Act and to support the Act's vital objectives of restoring and maintaining the quality of waters on which all Americans rely. If confirmed, I commit to working with the EPA's Office of General Counsel to ensure the EPA's actions do that.

Fischer 11. Do you agree that successful protection and maintenance of water quality is determined under the Clean Water Act by evaluating whether a water body is achieving water quality standards established by states and approved by EPA, which include a use designation and criteria to protect those uses?

Response: I agree that water quality standards are the foundation of the water quality-based pollution control program established by the Clean Water Act and can form a basis for determining success.

Fischer 12. Has a state designated any water body with the use of "least disturbed by human activity"?

Response: I am unaware of any state use designations under the Clean Water Act that use this specific term. However, states have significant flexibility in how they designate uses for their waters, and some states do establish categories of high quality waters to which little to no degradation is allowed.

Fischer 13. Absent any water quality standards established to protect and maintain a use of "least disturbed," do you believe it is appropriate for the Office of Water to evaluate its success in implementing the Clean Water Act by assessing water bodies based on whether they match the conditions of "least disturbed" waters?

Response: As noted in my response to Question 8, and as I noted at my confirmation hearing, I am not intimately familiar with the process used in the National Rivers and Streams Assessment to set a benchmark against which to compare monitoring results. I understand that the primary purpose of the National Rivers and Streams Assessment is to provide general information about the quality of our nation's waters, and not to serve a specific Clean Water Act regulatory purpose. If confirmed, I look forward to learning more about the approach used in the draft assessment to ensure that it represents the highest quality science and is effective at helping to assess the conditions of our nation's waters.

Fischer 14. If you believe it is appropriate to conduct a National Rivers and Streams Assessment for a purpose other than implementation of the Clean Water Act, please identify your authority to expend federal dollars to conduct this assessment.

Response: It is my understanding that the National Rivers and Streams Assessment, and the EPA's work to develop nationally consistent National Aquatic Resource Surveys, have been conducted in order to achieve the goals of the Clean Water Act, and are authorized under section 104.

Science Advisory Board Panel on Water Connectivity

In March 2013, EPA requested public nominations of scientific experts to form a Science Advisory Board (SAB) panel to review the agency's draft science synthesis report on the connectivity of streams and wetlands to downstream waters.

Fischer 15. What is the status of the nomination process?

Response: I understand that the EPA's Science Advisory Board is currently in the process of reviewing the nominations it has received from the public to serve on the advisory panel that will review the agency's draft science synthesis report.

Fischer 16. Will EPA commit to including individuals nominated by agricultural, industry, and property rights representatives in order to ensure that the agency lives up to its promise of balanced SAB review panel?

Response: I share your goal of ensuring that the agency's scientific products are reviewed by qualified, independent entities. I understand that the EPA's Science Advisory Board has an established process for soliciting nominees for its advisory panels, evaluating potential conflicts of interests, and selecting panelists in a transparent and non-biased way. If confirmed, I commit to ensuring that the Office of Water's scientific products undergo effective, independent peer reviews, and that we recommend to the SAB that it continue to follow its panel selection procedures.

Fischer 17. Specifically, will EPA include the seven individuals Agricultural Retailers Association recommended to Dr. Thomas Armitage on June 7, 2013?

Response: I am not familiar with the current status of the Science Advisory Board's efforts to select members of the peer review panel for the EPA's science synthesis document, which is a process conducted independently of the Office of Water. However, I believe that the Science Advisory Board staff are carefully reviewing the nominations they have received, including the individuals you refer to above.

Immediate Judicial Review of Jurisdictional Determinations

Fischer 18. EPA has recognized those who receive Clean Water Act compliance orders are entitled to immediate pre-enforcement judicial review under Administrative Procedure Act and the Supreme Court's decision in Sackett v. EPA. Given that jurisdictional determinations are similar to compliance orders in that they mark the agency's definitive ruling on Clean Water Act jurisdiction, obligate recipients to go through Clean Water Act permitting for discharges into "navigable waters," and fix the legal relationship between recipients and the EPA, will you recognize if confirmed that a property owner is entitled to immediate judicial review of jurisdictional determinations?

Response: I understand the importance of this question as the agencies work to apply the decision in *Sackett* v. *EPA*. As a general matter, however, EPA does not conduct jurisdictional determinations for landowners seeking Clean Water Act permits. Under Clean Water Act section 404, jurisdictional determinations are done by the Corps. If confirmed, I would be glad to work with you and the Corps to address this key issue.

State Revolving Funds

Fischer 19. I have been advised that if the annual Congressional capital grants to the Clean Water and Drinking Water State Revolving Funds (SRFs) are reduced to zero, the collective corpuses of the SRFs will diminish by 30% in 10 years. What is EPA's and the Administration's long-term plan and proposal for maintaining SRF capital grants to states on an annual basis, consistent with the policy of Section 101(a)(4) of Clean Water Act, to provide assistance to local governments with the huge costs to comply with federal combined sewer overflows and wastewater facility requirements?

Response: I appreciate your concern regarding our communities' ability to make drinking water and wastewater infrastructure investments in this time of diminishing state and federal resources. The Clean Water and Drinking Water State Revolving Funds are critical tools for helping achieve our nation's clean water goals, and I support continued investment by the Congress in these funds in future years. At the same time, if confirmed, I will support innovative EPA efforts to help achieve more efficient clean water results while reducing burdens on communities, such as by promoting integrated municipal wastewater and stormwater planning, and encouraging more efficient and cost effective green infrastructure approaches to addressing our wastewater and stormwater infrastructure needs.

Water Quality Standards Rulemaking

Fischer 20. It is understood that EPA has requested permission from the Office of Management and Budget to amend the agency's Water Quality Standard Regulations set forth in 40 CFR Part 131. What are the topics of that proposed regulation?

Response: The EPA is working on updating its water quality standards regulations, which have not been updated since 1983. Although the agency has not yet published a proposed rule, as noted in the agency's Regulatory Development and Retrospective Review Tracker, a number of issues have been raised by stakeholders or identified by the EPA in the implementation process that will benefit from clarification and greater specificity. The proposed rule addresses the following six key areas:

1) Administrator's determination that new or revised WQS are necessary;
2) designated uses;
3) triennial review requirements;
4) antidegradation;
5) variances to water quality standards; and
6) compliance schedule authorizing provisions.

Effluent Limits for Storm Water Permits

Fischer 21. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Response: The EPA is considering revisions to its stormwater rules that may include performance standards for stormwater discharges that could require sites to incorporate sustainable stormwater controls as the sites are developed and redeveloped – the time when it is

most cost effective to do so. These standards, if proposed and adopted, could require that stormwater from small storms be retained on or near a site, which would greatly reduce the amount of pollutants entering the nation's waterbodies. Further, I understand that EPA is considering ways to make the program flexible and recognize the many different approaches for addressing stormwater discharges. The legal authority for any such proposed rule is section 402(p)(6) of the Clean Water Act, 33. U.S.C. § 1342(p)(6), which provides that:

> *[T]he Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5) which designates stormwater discharges, other than those described in paragraph 2 [discharges already regulated] to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (b) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements as appropriate.*

Consent Decrees

Fischer 22. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

Response: While Clean Water Act enforcement is not part of the Office of Water's responsibilities, there is close coordination between the EPA's Offices of Water and Enforcement and Compliance Assurance and I look forward to the opportunity to continue to strengthen that partnership. The EPA has recently embarked upon an integrated planning initiative to recognize the challenges faced by municipalities. This voluntary approach allows municipalities to sequence wastewater and stormwater projects in a way that allows the highest priority environmental projects to come first in a manner that is within the financial capability of the municipality. If confirmed, I look forward to encouraging such efforts in order to meet water quality objectives and provide the most beneficial, cost effective solutions for our communities.

Spill Prevention. Control, and Countermeasure (SPCC) Plans

EPA officials have said farmers and ranchers need to determine if fuel storage on their farm and ranchers "would reasonably be expected" to discharge oil into waters of the United States. If so, they are then subject to the rule. But when questioned, EPA officials have refused to further define the term "reasonably be expected" and only say farmers and ranchers should consider a worst case scenario.

Fischer 23. Could you help my constituents by better defining when a "reasonable expectation" exists?

Fischer 24. If a farmer determines a reasonable expectation for a spill to reach waters does not exist, what criteria will EPA use to evaluate whether it agrees with a farmer's determination?

Fischer 25. What certainty do farmers and ranchers have that their determinations will be agreed to by EPA if inspected? (Nebraska Farm Bureau has heard from a member near Valentine who is 300 yards from the nearest ditch and miles away from the nearest stream; should that farmer "reasonably expect" a spill to enter a water of the U.S.?)

Fischer 26. Does agriculture have a history of large oil or fuel spills?

Fischer 26a. If not, why did EPA seek to include farms and ranches in the SPCC regulation?

Fischer 26b. Can EPA justify the possibly significant compliance cost to farmers and ranchers given the lack of history of spills?

Fischer 27. Because of the SPCC regulation, Ihave heard farmers and ranchers are now buying smaller fuel tanks to avoid the high cost of compliance. The smaller tanks mean fuel delivery personnel would likely need to deliver fuel more often (at a higher cost to the farmer) to meet the needs of their customers. Would you agree that large fuel trucks making more trips and spending more time on the road not only increases the potential for a spill from those trucks, but also increases the environmental impacts because of the increase in time spent on the road?

Response to Fischer 23-27: The Spill Prevention, Control, and Countermeasure (SPCC) rule is managed through the Office of Solid Waste and Emergency Response, and is not within the purview of the EPA's Office of Water. Therefore, I am not in a position to provide detail on these specific questions. However, it is my understanding that the EPA has provided guidance for the agricultural sector regarding this rule, and seeks input from the agricultural community if any provisions of this rule remain unclear. If confirmed, I would look forward to working with the Office of Solid Waste and Emergency Response and with farmers and ranchers to ensure that the agency's clean water programs are well coordinated on these lands.

Duplicative Pesticide Permits

Fischer 28. I would like to address the duplicative permitting requirement for pesticide applications. As you know, Clean Water Act permits are now required for certain pesticide applications that are already safely governed under the Federal Insecticide, Fungicide, and Rodenticide Act. I understand EPA has provided technical assistance to Congress on legislation to address this issue, and I hope the agency will continue to work cooperatively with Congress on this matter. If you are confirmed, will you support efforts to reduce the duplicative permitting requirement for pesticides?

Response: If confirmed, I will work closely with the EPA's Office of Chemical Safety and Pollution Prevention to ensure that pesticide related work under the Clean Water Act by the Water Office is effectively coordinated with the agency's work under the Federal Insecticide, Fungicide, and Rodenticide Act.

CAFO Clean Water Act Permits for "Dust and Feathers"

It is my understanding EPA has been issuing enforcement orders compelling livestock and poultry farmers to seek a federal Clean Water Act permit for small, incidental amounts of dust, feed, feathers, and manure on the farmyard that could be washed away by rainwater, even if the farm is located a long way from any stream.

I want to be clear; I am not referring to manure piles or the production area where feed and animals are kept or manure storage facilities. The regulatory action in question relates to incidental amounts of feathers and dust blown from ventilation fans, or very small amounts of manure that can be tracked on a boot or tire and are commonly found on all farms.

Fischer 29. Do farmers have to worry about controlling rainwater that falls on their barnyards that may carry very small amounts of pollutants into waters?

Fischer 30. Do small amounts of dust, feathers, and manure found on any livestock farmyard require a federal permit when washed by rain into a stream?

Fischer 31. Why isn't that just ordinary agricultural stormwater that is common to all farms and specifically exempted from regulation by the Clean Water Act?

Response to Fischer 29-31. Your question asks about specific enforcement actions that the agency has taken with which I am not familiar. If confirmed as Assistant Administrator for Water, I can assure you that I would support efforts to provide maximum clarity for our nation's agricultural community regarding circumstances in which Clean Water Act permits are and are not required. Some agricultural operations, such as Concentrated Animal Feeding Operations (CAFOs), are required to obtain permits if they discharge pollutants to waters of the United States. I am also aware of recent court decisions that have addressed these specific issues. If confirmed, I would commit to working closely with the EPA's Office of Enforcement and Compliance Assurance, with the U.S. Department of Agriculture, with the agricultural community, and with Congress, to help reduce uncertainty for our nation's agricultural community regarding Clean Water Act permitting.

Fischer 32. Do farmers need to fear that, as Assistant Administrator, you intend to require federally mandated permits to regulate farm dust?

Response: Point sources, including Concentrated Animal Feeding Operations, need to obtain Clean Water Act permits only if they discharge pollutants into waters of the United States.

Questions for the Record
July 23, 2013 Hearing on the
Nomination of James Jones to be Assistant Administrator for the Office of Chemical Safety and Pollution Prevention of the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. Mr. Jones, can you please describe your views on the importance of the EPA using every available tool in its tool box to protect public health from dangerous chemicals?

Response: The EPA strongly supports legislative reform of the Toxic Substances Control Act (TSCA), which is badly outdated and does not provide the EPA with the tools it needs to adequately protect the American public and the environment from the risks from chemicals. The TSCA is the only major environmental statue that has not been updated. TSCA does not have a mandatory program or deadlines for the EPA to conduct a review to determine the safety of existing chemicals. In addition, the TSCA places procedural hurdles on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals. The TSCA also makes it difficult to take action to limit or ban chemicals found to cause unreasonable risks to human health or the environment, given the requirement that the EPA choose the least burdensome approach to address unreasonable risks.

While we work with this committee and others on reform efforts, we are also strongly committed to utilizing the current statute to the fullest extent possible to ensure chemical safety. For example, in early 2012, the EPA released a Work Plan of 83 chemicals for risk assessment over the coming years. If an assessment on a Work Plan chemical indicates a potential risk, the EPA will evaluate and pursue appropriate risk reduction actions, as warranted. If an assessment indicates negligible risk, the EPA will conclude its work on the uses of the chemicals being assessed. Nevertheless, without the TSCA reform, these chemical assessments will take significantly longer and actions to address potential concerns will be substantially more difficult due to the limitations in the current statute.

Boxer 2. Mr. Jones, the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention plays a key role in enforcing strong ethical and scientific protections that safeguard people from dangerous tests involving pesticides.

If confirmed, do you commit to make the enforcement of these protections a priority and to have a zero-tolerance approach to any violations of these important safeguards?

Response: Yes.

Boxer 3. Mr. Jones, do you believe that the administration's TSCA reform principles should be considered in TSCA reform legislation?

Response: Yes

Senator Carper

Carper 1. Mr. Jones, you've said that the public has the right to expect that the chemicals found in products that they use are safe and provide benefits without hidden harm. As you know, this Committee is currently considering various proposals for reforming toxics legislation. I am very hopeful that we can move forward with a package of reforms, and while I have some concerns about it, I believe that the compromise legislation drafted by Senator Lautenberg and Ranking Member Vitter is a good place to start. That being said, as with much of what we are tasked with in this Committee, passing a bipartisan reform bill will be difficult. In the absence of TSCA reform, what are the prospects for EPA's effective assessment of chemicals in the marketplace, and effective regulation of any chemicals that are found to have negative impacts on human health or the environment?

Response: The EPA strongly supports legislative reform of the TSCA, which is badly outdated and does not provide the EPA with the tools it needs to adequately protect the American public and the environment from the risks from chemicals. The TSCA is the only major environmental statue that has not been updated. The TSCA does not have a mandatory program or deadlines for the EPA to conduct a review to determine the safety of existing chemicals. In addition, the TSCA places high legal and procedural hurdles on the EPA before the agency can request the generation and submission of health and environmental effects data on existing chemicals. The TSCA also makes it difficult to take action to limit or ban chemicals found to cause unreasonable risks to human health or the environment, given the requirement that the EPA choose the least burdensome approach to address the unreasonable risk.

While we work with this Committee and others on reform efforts, we are also strongly committed to utilizing the current statute to the fullest extent possible to ensure chemical safety. For example, in early 2012, EPA released a Work Plan of 83 chemicals for risk assessment over the coming years. If an assessment on a Work Plan chemical indicates a potential risk, the EPA will evaluate and pursue appropriate risk reduction actions, as warranted. If an assessment indicates negligible risk, the EPA will conclude its work on the uses of the chemicals being assessed. Nevertheless, without the TSCA reform, these chemical assessments will take significantly longer and actions to address potential concerns will be substantially more difficult due to the limitations in the current statute.

Carper 2. In the past, it's been EPA's position that for any TSCA reform effort to be effective, EPA must have the tools to quickly and efficiently obtain information from manufacturers that is relevant to determining the safety of chemicals. I agree that good and complete information must be central to any reform effort. But I also know that some companies are wary of minimum requirements for data, which could compromise proprietary business information. Could you talk a little bit about how you'd recommend striking a balance between the need for information with this sensitivity of chemical products manufacturers?

Response: The EPA takes very seriously our commitment to ensuring the confidentiality of a company's proprietary chemical information under our current statutory authority and would certainly have the same commitment to carry out the protections contained in reformed chemicals management legislation. The administration's "Essential Principles for Reform of Chemicals Management Legislation" identify the need for the EPA to have the information

necessary to conclude whether chemicals are safe for the public and the environment. We are committed to protecting legitimate claims of proprietary business information while providing the agency with the information it needs to make safety determinations and are confident that we can continue to strike that balance.

Carper 3. Like many federal agencies, EPA has taken a fairly big budget hit in recent years. If TSCA reforms are successful, I am concerned about EPA's ability to implement them considering a limited budget. Similarly, I am concerned about resources being shifted from other programs, such as the clean air programs that are so important to ensuring the air we breathe is healthy. Could you comment on this challenge, and how you'd work to address it?

Response: Despite a challenging budget climate, the EPA plans to sustain its chemical safety program at a level that will enable essential work to proceed to review new chemicals before introduction into the marketplace and on our efforts to evaluate and manage potential risks of chemicals already in commerce. This work, however, may have to proceed more slowly if resources are further reduced. The EPA has no plans to shift resources from other programs, such as clean air or water.

Senator Vitter

Topic: Confidential Business Information (CBI)

Vitter 1. EPA recently sent to OMB a Notice of Proposed Rulemaking to amend the PMN regulations to prohibit companies from protecting chemical identity in health and safety studies, unless to do so would reveal process or concentration information. If implemented, any company that invested hundreds of thousands of dollars, or perhaps millions, on research and development to create new and innovative chemistries that don't fall within these two exceptions that EPA would recognize (e.g. surfactants; reactive products) would have to reveal those confidential chemical identities.

Can you comment on the potential for this policy to have an adverse impact on innovation and the economy?

Response: We are currently working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for premanufacture notice (PMN) chemicals before we move forward.

Vitter 2. Mr. Jones, if I read EPA's interpretation of Section 14(b) correctly, the Agency believes that it does not have the authority to protect confidential chemical identities except when that information would reveal process information or concentration in a mixture.

Is this correct?

Response: Section 14(b) applies only to confidentiality claims made in the context of health and safety studies. The EPA has not adopted an interpretation in this regard. In the PMN context, the EPA is working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for PMN chemicals before we move forward.

Vitter 3. If EPA's interpretation is correct, that would suggest that the Agency was acting beyond its authority for more than 30 years. Alternatively, if EPA's new interpretation of Section 14 is not correct, the Agency is about to embark on actions that it is not authorized to do under the statute.

Has the Office of General Counsel at EPA analyzed these questions about EPA's authority? What has OGC concluded?

Response: The EPA's Office of General Counsel has been and will remain closely engaged as the EPA works through the intergovernmental process on this issue.

Vitter 4. Mr. Jones, while I am generally supportive of EPA's goals for providing the public better access to information about chemicals, I am very concerned about certain aspects of the Agency's current stance on CBI. In 20 I 0 EPA announced a policy shift in its interpretation of Section 14(b) of the Toxic Substances Control Act (TSCA) and plans to deny claims for confidential chemical identity in health and safety studies except where disclosing that identity would also disclose process information or concentrations in a mixture or formulation. This

narrow interpretation of the statute's protection of CBI is a direct contradiction of more than 30 years of EPA's own legal and policy position as well as legislative history. It is also inconsistent with 5 other federal environmental statutes enacted between 1972 and 1986, all of which provide for disclosure of health and safety effects information while still protecting confidential chemical identities. In fact, even EPCRA, the Right-to-Know statute allows confidential chemical identity to be protected in a health and safety study.

Can you please comment on EPA's more recent interpretation of TSCA 's CBI provisions and why the Agency now thinks TSCA should treat confidential chemical identity differently than it's treated under the other five federal environmental statutes?

Response: As indicated in the response to the first question on this issue (see Vitter 1), we are currently working to better understand the impact of such a rule change on innovation and the economy as well as the incentive structure for development of health and safety studies for PMN chemicals before we move forward.

Topic: Endocrine Disrupter Screening Program (EDSP)

Vitter 5. As you know, the extensive suite of EDSP Tier I screens is very costly {up to $1 million per chemical) and several of them have come under significant criticism from a technical perspective. Computational toxicology methods and high throughput screens hold great promise for increasing efficiency and reducing the use of animal testing in the EDSP.

How will the Agency ascertain confidence in the use of ToxCast prediction models and the results they generate for decision making in the EDSP, including use for prioritization?

Response: Computational toxicology and high throughput methods defining endocrine activity are being developed by the EPA to improve the efficiency and reduce animal testing in the EDSP Tier 1 battery of assays. In January 2013, the EPA asked the Scientific Advisory Panel (SAP) to review and comment on using these computational and high throughput approaches for prioritizing chemicals for the EDSP. The SAP endorsed the EPA's approach and encouraged continued use of ToxCast and other predictive models for prioritization. As we continue to incorporate the best available science into the EDSP, our confidence in all relevant data and models will be regularly assessed in open and transparent forums such as SAP peer review.

Vitter 6. When the EDSP was first being developed, a joint committee of EPA's Science Advisory Panel (SAP) and SAB recommended that after the initial round of EDSP screening, the Agency should analyze the results and conduct an independent scientific review, with an eye towards revising the process and eliminating those EDSP screening methods that may be found to be flawed. The SAP is now reviewing and analyzing the results and experiences gained from this first round of EDSP testing, to learn which assays are working well and which are not and to leverage this information to support the development of an improved EDSP, before requiring testing of additional chemicals.

Will EPA review the SAP analysis before requiring testing of additional List 2 chemicals?

Response: Yes.

Topic: EPA's Design for the Environment (DfE) Safer Product Labeling Program

Vitter 7. Congress gave EPA authority under the TSCA to require labeling or otherwise restrict the use of chemicals if EPA determines that the use of the chemical presents or will present an unreasonable risk of injury to health or the environment. This means evaluating public exposure and doing a traditional risk assessment that is made available for public comment.

Given that the DfE program is not evaluating likely public exposure and risk, is EPA trying to end run a congressionally mandated program through this labeling program?

Response: No. The EPA's DfE program exercises authority from three statutes: the Pollution Prevention Act (PPA), the Toxic Substances Control Act (TSCA), and the National Environmental Policy Act (NEPA), as detailed below. Section 6604(b)(5) of the PPA, 42 USC 13103(b)(5), authorizes the EPA to "facilitate the adoption of source reduction techniques by businesses." The term "source reduction" is defined at section 6603(5) of the PPA, 42 USC 13102(5) and, in short, can involve changes in design, manufacture, purchasing, or use of materials to reduce the amount hazardous substances that are released to the environment. By contributing information that can be used to identify safer alternative chemicals, DfE helps businesses consider options that may ultimately achieve source reduction.

Section 10 of the TSCA, 15 USC 2609, authorizes the EPA to conduct research, development and monitoring to carry out the purposes of the TSCA, including to effectively regulate chemical substances and mixtures to prevent unreasonable risk of injury to health or the environment. Such research can lead to commercial innovations in the production of chemical substances and mixtures to reduce the risk of injury to health and the environment. By providing a framework for researching the human and environmental health characteristics of alternative chemicals, DfE helps identify innovations in safer chemistry that can reduce risk.

In addition, the EPA has authority under section 102(2)(G) of the NEPA, 42 USC 4332(2)(G), to provide advice and information available to units of government, institutions and individuals that may be used to restore, maintain and enhance the quality of the environment. DfE provides information on potential chemical hazards that decision makers can use in selecting chemicals that are safer for human and environmental health.

Vitter 8. Currently, EPA does not allow products with the DfE logo to use packaging that contains bisphenol A, or BPA. This conclusion is at odds with the FDA, which considers exposure and risk. According to the FDA, BPA is safe in food contact materials.

Vitter 8a. Why doesn't EPA defer to FDA on this point since FDA has actually looked at public exposure and risk while EPA has not?

Response: DfE is a voluntary recognition program designed to allow partners to differentiate products made with chemicals that are "best in class" for their functional use as it relates to their hazard to human health and the environment.

Vitter 8b. How is the public supposed to rectify this inconsistency?

Response: We believe the public understands the concept of best in class.

Vitter 9. Do you have any idea of the benefits or costs of this program?

Vitter 10. Isn't this another reason why you should not be proceeding with this program?

Response to 9 and 10: From the point of view of economic analysis, businesses will voluntarily participate in a program if it offers them (economic) benefit. The fact that more than 500 U.S. businesses participating in the DfE program, some for a period of many years, speaks to the program's usefulness and economic advantage.

Vitter 11. Does EPA look at the likelihood of actual public exposure in determining which products are "safer" under this program?

Vitter 12. If EPA does not look at the likelihood of actual public exposures, then how does EPA determine which products actually pose lower or higher risks?

Response to 11 and 12: The Safer Product Labeling Program requires the use of the lowest hazard chemicals for each functional use ("best in class"). Because exposure is held essentially constant, a reduction in hazard results in a reduction in risk.

Vitter 13. Couldn't this labeling program be more hurtful then helpful?

Response. That seems very unlikely, as we are confident that labeled products are of lower risk for their intended use.

Vitter 14. Isn't it possible that another product on the shelf could actually pose a lower risk – that is, be Safer – than the product with the DfE label?

Response. Because the Safer Products Labeling Program is voluntary, it is theoretically possible that a product that does not bear the DfE logo could have an equivalent or better safety profile to a DfE labeled product. The presence of the DfE logo on a product offers an assurance to consumers that a product has been carefully and objectively reviewed by scientific experts and determined to be safer for human and environmental health.

Vitter 15. Aren't you then misleading consumers?

Response. No. The EPA confirms that a product bearing the DfE logo has low concern for individuals, families, and the environment.

Vitter 16. The regulatory process has built-in protections to prevent arbitrary and capricious action by agencies.

Vitter 16a. Why should American consumers have the content of their products determined by a judgment of EPA made outside of the regulatory process?

Response: The EPA is not regulating these products or determining their content. Rather, the agency evaluates whether the products formulated and submitted voluntarily by U.S. businesses meet transparent criteria for chemical safety, and differentiates those that are best in class.

Vitter 16b. Why does EPA seek to operate outside of that framework?

Response: The EPA is continually looking for nonregulatory collaborative means to achieve our goals of protecting human health and the environment. The DfE Safer Product Labeling Program is an example of collaboration between industry, the EPA, and other stakeholders to send appropriate market signals as incentives for development and use of safer chemicals.

Vitter 16c. Will you commit to a rulemaking process to establish the standards and procedures for the alternatives assessment?

Response: The EPA has been very transparent and has encouraged public participation in development of the standards for the Safer Product Labeling Program and for methodology for alternatives assessments.

Vitter 17. Under the DfE Safer Product Labeling Program, EPA evaluates products and grants the manufacturer the right to put a DfE Safer Chemistry label on the product if it meets the DfE criteria.

Vitter 17a. What is EPA's authority for this labeling program?

Vitter 17b. Did Congress ever specifically authorize EPA to conduct this labeling program that would deem some products to be safer than others? [The Pollution Prevention Act authorizes EPA to provide information and technical assistance to businesses, but does not include authority for a safe product-labeling program.]

Response to 17 a-b: Please see the response to Vitter 7.

Vitter 18. Under the Organic Food Production Act of 1990, Congress explicitly granted the USDA authority to establish a "USDA Organic" label. Similarly, under the Energy Independence and Security Act of 2007 Congress explicitly granted EPA and DOE the authority to conduct the "Energy Star" labeling program for appliances.

Vitter 18a. Why did EPA believe it could proceed without Congressional authority to establish this labeling program given its potential to affect markets?

Vitter 18b. Don't you think we would have explicitly authorized a consumer product-labeling program if we intended EPA to have this authority?

Response to 18 a-b: The Congress has repeatedly encouraged the EPA to use nonregulatory means and to more closely work with industry. Please also see the response to Vitter 7.

Vitter 19. Why wasn't the DfE Safer Program Labeling Program and standards developed in accordance with the Administrative Procedures Act rulemaking requirements?

Vitter 20. The APA defines a "rule" to include "an agency statement of general or particular applicability" that "implement, interpret or prescribe law or policy."

Vitter 20a. Don't you believe that the establishment of criteria that says one product is safer than another constitutes a "rule" under that definition?

Vitter 20b. Why did EPA not place any notices in the Federal Register to alert the public as required by the APA?

Vitter 20c. Why did EPA simply assume everyone would know to look for a DfE website?

Vitter 20d. Do you think this upholds the Administration's commitment to transparency and open government?

Vitter 20e. Will you commit to full transparency for the DfE program?

Responses to 19 and 20 a-e: The DfE Safer Labeling Program is a voluntary program that does not impose any enforceable requirements on the regulated community. Companies are not required to participate in the DfE Safer Labeling Program and the program standards are not judicially enforceable legislative rules. As such, the DfE program standards are exempt from the notice and comment requirements of the Administrative Procedure Act (APA). However, many DfE notices have been published in the Federal Register or made public on the Agency's website. Finally, I commit to full transparency in the program and am open to suggestions from any stakeholders as to how we can make the program more transparent.

Topic: Formaldehyde

Vitter 21. In 2010, Congress unanimously passed the "Formaldehyde Standards for Composite Wood Products Act" directing EPA to develop a formaldehyde standard that implements, on a national level, the world's most stringent standard developed by the California Air Resources Board (CARB). In a proposed rule-making conducted pursuant to the Act, the Agency has expanded the definition of laminated products to include fabricators as manufacturers of hardwood plywood composite wood products. This proposed expansion of the definition of laminated products deviates dramatically from the California standard and would create a significant burden for a number of domestic industries by requiring duplicative testing of the same product previously tested by the original manufacturer while providing no additional environmental or health benefit. This deviation from the California rule is not only duplicative and overly burdensome, but in my opinion the definitional expansion is contrary to the intent of Congress in passing the Act.

Can you commit to work with me to ensure that this proposal is modified to conform to the intent of Congress and what EPA ultimately implements is the California standard?

Response: The bill passed by Congress authorized the EPA to exempt laminated products if we could make a finding that the agency could ensure compliance with the emission standards. After consideration of all available and relevant information, the EPA determined that it did not have a sufficient basis to propose categorically exempting all laminated products and ensure

compliance with the emission standards. However, we will consider additional information on this issue as we develop the final rule.

The EPA did, however, propose to exempt laminated products made with certified cores and no-added formaldehyde resins because the EPA has determined that it is very unlikely that these products would exceed the formaldehyde emission standards for the core. If confirmed, I welcome the opportunity to work with you to ensure that the final rule complies with the Act.

Vitter 22. In the Formaldehyde Emissions Standards for Composite Wood Products rule, proposed on June I 0, EPA notes (in its fact sheet) that it "anticipates that the proposed rules will encourage the ongoing trend by industry towards switching to no-added formaldehyde resins in products." While we recognize that Congress provided limited discretionary authority in the Formaldehyde Standards for Composite Wood Products Act, your statement highlights a serious concern that EPA is reaching beyond its authority to distort the marketplace by pushing de-selection of certain chemistries or technologies in the proposed rule. Congress mandated this regulation, including a set of emissions standards that clearly set forth a performance-based approach for regulating formaldehyde emissions from composite wood products, irrelevant to the type of chemistry or technology used.

Vitter 22a. Why is it appropriate for EPA, under its TSCA authority, to be giving preferential regulatory treatment to a particular chemistry?

Response: In the Formaldehyde Standards for Composite Wood Products Act (FSCWPA) of 2010, the Congress provided for preferential treatment for no-added formaldehyde (NAF) resins. The EPA was simply pointing out in its fact sheet what appears to be a market trend that would likely be sped up by this statute.

Vitter 22b. If Congress were to reform TSCA, why should we not expect a program that reflects this propensity for picking winners and losers?

Response: As noted in the previous response, the EPA's intent is to implement the Congress's approach in the FSCWPA. This appears to be entirely consistent with an apparent market trend towards NAF and ULEF resins and consistent with the Congress's practice to encourage and require through statute that the EPA identify and provide incentives for pollution prevention technologies.

Vitter 23. The EPA's proposed Formaldehyde Emissions Standards for Composite Wood Products rule references throughout its Preamble and in supporting documentation the most recent draft EPA formaldehyde IRIS assessment when opining on potential health impacts.

Given the fact that the NAS reviewed and provided a significant critique on the EPA's draft IRIS assessment, would you agree that it is not appropriate to refer to that draft given the major methodological and evidenced-based limitations the NAS identified in the draft assessment and the roadmap it outlined for significant improvements?

Response: The EPA referred to the draft Integrated Risk Information System (IRIS) assessment in order to explain that it was neither the basis for setting the emission standards, nor for calculating the benefits of the proposed rule.

Topic: Lead Bullets

Vitter 24. In 2010, EPA denied a petition by environmental groups to regulate lead in ammunition and fishing tackle under TSCA. I strongly agreed with EPA's denials of that petition and have been alarmed to see renewed discussion of this effort by certain folks within the environmental community.

Vitter 24a. [There is no 24a question]

Vitter 24b. It seems clear to me that EPA does not have the authority to regulate ammunition under TSCA, would you agree with that?

Response: Yes.

Vitter 24c. Can you give me an update on whether you have seen any compelling information that would change the Agency's opinion on the need to regulate lead in fishing tackle?

Response: The EPA does not see a compelling reason to change our view on the need to regulate lead in fishing tackle.

Vitter 25. Mr. Jones, a number of US states have initiated regulatory activities directed at specific chemical substances, or intended to allow the state to identify chemicals of concern or "high priority" chemicals.

Vitter 25a. Do you see a benefit to EPA from your staff being able to share with such states confidential business information that EPA has received from industry submitters with respect to chemical substances, including those chemicals that might be under consideration by regulatory authorities in those, or other states?

Response: States and the federal government together manage chemical risk and public health in the United States. Yet under the TSCA, the EPA does not have the authority to routinely share data claimed as confidential business information (CBI) with our partners, the states. The Administration's Principles for TSCA Reform include the need to share CBI with the states.

Vitter 25b. Would sharing confidential business information with the states require amendments to TSCA?

Response: Yes.

Vitter 25c. If TSCA were amended in that respect, how would the Agency assure the submitters of CBI that their trade secrets can be practically safeguarded by the states against problems our nation is experiencing with safeguarding trade secrets and cyber security?

Response: The EPA takes very seriously our commitment to ensuring the confidentiality of a company's proprietary chemical information under our current statutory authority and would certainly have the same commitment to carry out the protections contained in reformed chemicals management legislation. The administration's "Essential Principles for Reform of

Chemicals Management Legislation" indicate that the EPA should be able to negotiate with other governments on appropriate sharing of CBI with the necessary protections.

Topic: Phthalates Alternatives Assessment

Vitter 26. I understand that the DfE program is currently conducting an assessment of phthalates and that your website states "The goal is for the resulting information to help inform the process of substituting safer alternatives, with reduced health and environmental concerns, for these phthalate chemicals." This would appear to indicate that EPA has already made a judgment that phthalates pose a significant risk that is higher than the likely alternatives.

Vitter 27. Is this true?

Response to 26 and 27: No

Vitter 28. Has EPA evaluated the risk from likely alternatives?

Response: Under DfE's Alternatives Assessment program, the EPA evaluates the hazard of the alternatives, not risk.

Vitter 29. If not, isn't the Agency being arbitrary and capricious and possibly reckless in this labeling program?

Response: This alternatives assessment is not part of the DfE Safer Product Labeling Program and does not involve labeling. Rather, it is part of the DfE alternatives assessment multistakeholder effort to identify and compare potential alternatives based on their hazard profiles and other characteristics. This information can be combined with other product specific information, which might include cost, availability, exposure and risk, to inform decision making.

Vitter 30. Will you commit that the phthalates alternatives assessment will be a fair and objective assessment of the risks of the alternatives.

Response: As noted above, the DfE alternatives assessment evaluate hazard, not risk. EPA commits that the alternatives assessment will be a fair, objective, and transparent assessment of the hazards of the alternatives.

Topic: TSCA Work Plan Chemical Assessments

Vitter 31. EPA has started the peer review of the first TSCA Workplan Assessment, Trichloroethylene (TCE). Thus far the review has not provided any opportunities for true public engagement and dialogue with the peer review panel. In fact it is unclear whether the peer reviewers have any obligation to consider public input at all. When asked direct questions about this, and other substantive comments, the peer review chair ignores questions from the public.

Can you explain why the Agency and its peer reviewers have been so vague in their communications with the public regarding not only the public opportunities to engage in peer review but also regarding the substance of the assessments?